No. 16-1423	
Title:	**Keanu D. W. Ortiz, Petitioner** **v.** **United States**
Docketed:	May 30, 2017
Linked with 16A1034	
Lower Ct:	United States Court of Appeals for the Armed Forces
Case Numbers:	(16-0671)
Decision Date:	February 9, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Apr 21 2017	Application (16A1034) to extend the time to file a petition for a writ of certiorari from May 10, 2017 to June 9, 2017, submitted to The Chief Justice.
Apr 26 2017	Application (16A1034) granted by The Chief Justice extending the time to file until June 9, 2017.
May 19 2017	Petition for a writ of certiorari filed. (Response due June 29, 2017)
Jun 26 2017	Order extending time to file response to petition to and including July 31, 2017.
Jul 27 2017	Order further extending time to file response to petition to and including August 18, 2017.
Aug 18 2017	Brief of respondent United States in opposition filed.
Aug 30 2017	Reply of petitioner Keanu D. W. Ortiz filed.
Sep 06 2017	DISTRIBUTED for Conference of 9/25/2017.
Sep 28 2017	Petition GRANTED, and the petitions for writs of certiorari in Nos. 16-961 and 16-1017 are granted. The cases are consolidated, and a total of one hour is allotted for oral argument. In addition to the questions presented by the petitions, the parties are directed to brief and argue the following question: Whether this Court has jurisdiction to review the cases in Nos. 16-961 and 16-1017 under 28 U. S. C. § 1259(3).

Nov 07 2017	Joint appendix filed. VIDED. (Statement of costs filed)
Nov 07 2017	Brief of petitioners filed. VIDED.
Nov 14 2017	Brief amicus curiae of Aditya Bamzai in support of neither party filed. VIDED.
Nov 17 2017	SET FOR ARGUMENT ON Tuesday, January 16, 2018. VIDED
Nov 22 2017	CIRCULATED.
Dec 07 2017	Brief of respondent United States filed. VIDED. **Proof of Service** **Main Document**
Dec 14 2017	Motion of Aditya Bamzai for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Jan 05 2018	Reply of petitioner Keanu D. W. Ortiz filed. VIDED. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service** **Other**
Jan 05 2018	Motion of Professor Aditya Bamzai for enlargement of time for oral argument, for leave to participate in oral argument as amicus curiae and for divided argument GRANTED, and the time is divided as follows: 30 minutes for petitioners, 10 minutes for Professor Aditya Bamzai, and 30 minutes for respondent. VIDED
Jan 09 2018	Record received from U.S.C.A. for the Armed Forces. (1 Box)
Jan 10 2018	Letter of respondent United States filed. VIDED. (Distributed) **Main Document**
Jan 16 2018	Argued. For petitioners: Stephen I. Vladeck, Austin, Tex. For Professor Aditya Bamzai as amicus curiae: Aditya Bamzai, Charlottesville, VA. For respondent: Brian H. Fletcher, Assistant to the Solicitor General, Department of Justice, Washington, D. C. VIDED.
Jan 16 2018	Record received from the U.S.C.A. for the Armed Forces. (1 Box)

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RECORD AND BRIEFS

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No. 16-____

IN THE
Supreme Court of the United States

KEANU D.W. ORTIZ,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since shortly after the Civil War, federal law has required specific authorization from Congress before active-duty military officers may hold a "civil office," including positions that require "an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii).

After President Obama nominated and the Senate confirmed Colonel Martin T. Mitchell as an "additional judge" of the Article I U.S. Court of Military Commission Review (CMCR), Judge Mitchell continued to serve as an appellate military judge on the U.S. Air Force Court of Criminal Appeals (AFCCA), including on the panel that heard (and rejected) Petitioner's appeal of his conviction by court-martial. The U.S. Court of Appeals for the Armed Forces (CAAF) rejected Petitioner's objections to such dual-officeholding, concluding that any statutory or constitutional infirmities with such dual service implicated Judge Mitchell's CMCR position, and not his eligibility to continue to serve on the AFCCA.

The Questions Presented are:

1. Whether Judge Mitchell's service on the CMCR disqualified him from continuing to serve on the AFCCA under 10 U.S.C. § 973(b)(2)(A)(ii).

2. Whether Judge Mitchell's simultaneous service on both the CMCR and the AFCCA violated the Appointments Clause.

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PETITION FOR A WRIT OF CERTIORARI

Keanu D.W. Ortiz respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 76 M.J. 189 (C.A.A.F. 2017). It is reprinted in the Appendix at Pet. App. 1a. The opinion of the U.S. Air Force Court of Criminal Appeals is not reported. It is available at 2016 WL 3681307, and is reprinted in the Appendix at Pet. App. 23a.

JURISDICTION

The Court of Appeals granted Petitioner's petition for review on October 27, 2016, Pet. App. 21a, issued an order and judgment on February 9, 2017, Pet. App. 16a, and issued an opinion respecting that judgment on April 17, 2017. Pet. App. 1a. On April 26, 2017, the Chief Justice granted Petitioner's application for an extension of time within which to file this Petition until June 9, 2017. The Court has jurisdiction under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appointments Clause provides that the President:

> shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the

> appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

U.S. CONST. art. II, § 2, cl. 2. The Commander-in-Chief Clause provides that "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." *Id.* art. II, § 2, cl. 1.

As relevant here, the military dual-officeholding statute provides that:

> Except as otherwise authorized by law, an officer to whom this subsection applies [including "a regular officer of an armed force on the active-duty list"] may not hold, or exercise the functions of, a civil office in the Government of the United States . . . that requires an appointment by the President by and with the advice and consent of the Senate.

10 U.S.C. § 973(b)(2)(A)(ii). A 1983 amendment to the statute further provides that "[n]othing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." *Id.* § 973(b)(5).

INTRODUCTION AND STATEMENT OF THE CASE

The Questions Presented are already before the Court in *Dalmazzi* v. *United States*, No. 16-961, and *Cox* v. *United States*, No. 16-1017. Unlike those cases, however, the Court of Appeals in Petitioner's case reached the merits of (and rejected) the statutory and

constitutional objections to Judge Mitchell's dual officeholding. *See* Pet. App. 6a–13a. Thus, although this Court can—and should—reach the merits in *Dalmazzi*, this Petition provides an additional vehicle for ensuring that the important statutory and constitutional questions raised in all three petitions are promptly resolved. *See* Brief for the United States in Opposition at 22, *Dalmazzi* v. *United States*, No. 16-961 (U.S. filed May 15, 2017) [hereinafter "U.S. *Dalmazzi* Brief"] (explaining that this case presents the same questions as *Dalmazzi* and *Cox*, but "without the threshold jurisdictional obstacle [on which CAAF relied] and in a case in which the CAAF passed upon the relevant claims"). It should therefore be granted regardless of whether certiorari is granted in *Dalmazzi* and *Cox*.

A. Legal Background

Since shortly after the Civil War, Congress has generally prohibited active-duty military officers from holding a second non-military position within the Executive Branch. *See* Act of July 15, 1870, ch. 294, § 18, 16 Stat. 315, 319. Although subsequent measures have carved out a handful of express exceptions to this dual-officeholding ban, the general prohibition remains in force. *See* 10 U.S.C. § 973(b).

More than an antiquated technical provision, the dual-officeholding ban is designed "to assure civilian preeminence in government, *i.e.*, to prevent the military establishment from insinuating itself into the civil branch of government and thereby growing 'paramount' to it." *Riddle* v. *Warner*, 522 F.2d 882, 884 (9th Cir. 1975); *see also Memorandum for the General Counsel, Gen. Servs. Admin.*, 3 OP. O.L.C. 148, 150 (Apr. 10, 1979) [hereinafter "1979 OLC Memo"] ("That

section embodies an important policy designed to maintain civilian control of the Government."). As the Office of Legal Counsel (OLC) explained in 1983, "the provision was intended to bar the appointment of regular military officers to *any* appointive positions in the civil government, irrespective of the importance of the office, the permanence of the appointment, or the likelihood of interference with the officer's military duties." Off. of Legal Counsel, *Applicability of 10 U.S.C. § 973(b) to JAG Officers Assigned to Prosecute Petty Offenses Committed on Military Reservations* 15 (May 17, 1983) [hereinafter "1983 OLC Memo"] (emphasis added).[1] This was so because "allowing active duty regular military officers to hold civil office [would be] 'in conflict with the fundamental principle of republican institutions.'" *Id.* at 11 (quoting Cong. Globe, 41st Cong., 2d Sess. App. 3403 (May 12, 1870) (statement of Sen. Sumner)).

Among other things, § 973(b) makes it unlawful for an active-duty military officer to "hold, or exercise the functions of, a civil office in the Government of the United States . . . that requires an appointment by the President by and with the advice and consent of the Senate," except where such service is "otherwise authorized by law." 10 U.S.C. § 973(b)(2)(A)(ii). Thus, as relevant here, the dual-officeholding ban applies to all "civil offices" held either by principal Executive Branch officers, *see Myers* v. *United States*, 272 U.S. 52 (1926), or by inferior officers whose appointment has not properly been vested in some other body. *See* U.S. CONST. art. II, § 2, cl. 2 (requiring presidential nomination and Senate advice and consent for inferior

1. The 1983 OLC Memo is available at https://perma.cc/YLM8-KTR6.

officers the appointment of whom Congress has not vested "in the President alone, in the courts of law, or in the heads of departments").

The dual-officeholding claim in this case arises from the unique structure of the U.S. Court of Military Commission Review (CMCR). That court was created in 2006 (and substantially reformed in 2009) to serve as an intermediate appellate court between military commissions convened under the Military Commissions Act (MCA), 10 U.S.C. §§ 948a–950t, and the U.S. Court of Appeals for the District of Columbia Circuit. *Id.* § 950f.

In the MCA, Congress provided two different mechanisms for staffing the CMCR with judges. First, the Secretary of Defense was empowered to "*assign* persons who are appellate military judges to be judges on the Court. Any judge so assigned shall be a commissioned officer of the armed forces." *Id.* § 950f(b)(2) (emphasis added). This provision apparently contemplates the assignment of judges already serving on the service-branch-specific Courts of Criminal Appeals (CCAs) within the military justice system. *See id.* § 866(a) (referring to "appellate military judges").

CCA judges are Executive Branch inferior officers for purposes of the Appointments Clause, *Edmond* v. *United States*, 520 U.S. 651, 661–66 (1996). Active-duty military officers (who are already Executive Branch inferior officers) may thus be "assigned" to the CCAs as judges, rather than "appointed" thereto. *See Weiss* v. *United States*, 510 U.S. 163, 174–76 (1994). But because the CMCR, unlike the CCAs, is not subject to appellate (or other) supervision within the Executive Branch, CMCR judges are almost certainly

principal officers, for reasons the D.C. Circuit detailed (while reserving a ruling) in *In re Al-Nashiri*, 791 F.3d 71, 82–85 (D.C. Cir. 2015), and to which the Court of Appeals alluded below. *See* Pet. App. 13a.

CMCR judges therefore hold an office "that requires an appointment by the President by and with the advice and consent of the Senate," 10 U.S.C. § 973(b)(2)(A)(ii), a conclusion the Executive Branch seems to share. Thus, in direct response to the D.C. Circuit's ruling in *Al-Nashiri* (and after initially having been "assigned" to the CMCR in 2014), Judge Mitchell was "appointed" to the court using the MCA's second staffing mechanism. *See* 10 U.S.C. § 950f(b)(3). That provision authorizes the President to "*appoint*, by and with the advice and consent of the Senate, additional judges to the [CMCR]." *Id.* (emphasis added). Every judge who has joined the CMCR since the D.C. Circuit's ruling in *Al-Nashiri* has similarly been "appointed" to that court.[2]

CMCR judges also hold a "civil office." The political branches have long embraced "a very liberal interpretation of the phrase 'civil office'" in § 973(b). *Army Officer Holding Civil Office*, 18 OP. ATT'Y GEN. 11, 12 (1884); *see* 1979 OLC Memo, *supra*, at 150 n.4 ("The Attorneys General . . . have ruled that . . . the policy of the statute points to a very broad

2. Even if CMCR judges are inferior officers, the appointment of active-duty military officers to such positions still triggers § 973(b)(2)(A)(ii) because *appointments* to the CMCR (unlike *assignments* to it) may only be made by the President "by and with the advice and consent of the Senate." 10 U.S.C. § 950f(b)(3). As a result, Petitioner's statutory argument does not turn on whether "additional" CMCR judges are principal or inferior officers for purposes of Article II; either way, they hold a "civil office" within the meaning of § 973(b)(2)(A)(ii).

interpretation of the term 'civil officer.'"). To that end, the Justice Department has concluded that, "[i]f the position is one established by statute, and if its duties involve the exercise of 'some portion of the sovereign power,' it is a 'civil office' within the prohibition of § 973(b)." 1983 OLC Memo, *supra*, at 24; *see also* 44 COMP. GEN. 830, 832 (1965) ("The specific position must be created by law; there must be certain definite duties imposed by law on the incumbent; and they must involve some exercise of the sovereign power."). Judges appointed to the CMCR under § 950f(b)(3) easily meet this definition; the position is created by law, it has definite duties imposed by law, and it involves a clear exercise of sovereign (judicial) power.

The very breadth of the term "civil office" is why Congress in 1983 added three narrowing conditions to § 973(b)—including the requirement at issue here, *i.e.*, that the civil office require "an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii); *see also Whether a Military Officer May Continue on Terminal Leave After He Is Appointed to a Federal Civilian Position Covered by 10 U.S.C. § 973(b)(2)(A)*, 40 OP. O.L.C. 1, 9–10 (Aug. 2, 2016) [hereinafter "2016 OLC Memo"] (describing the motivation and purpose of the 1983 amendments to § 973(b)).

Any doubt that CMCR judges hold a "civil office" is resolved by the 2009 amendments to the MCA, which reconstituted the CMCR as an Article I "court of record." 10 U.S.C. § 950f(a); *see also In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016).[3] Thus, as in *Freytag* v.

3. Indeed, the position of "appointed judge" on the CMCR under § 950f(b)(3) was *created* by the 2009 statute. Under the MCA as originally enacted in 2006, judges could only be "assigned" to the CMCR. *See* Military Commissions Act of 2006,

C.I.R., 501 U.S. 868 (1991), "the clear intent of Congress [was] to transform" the CMCR from an entity wholly within the Executive Branch "into an Article I legislative court," *id.* at 888, the judges of which hold a quintessential "civil office." *See, e.g.*, *Winchell* v. *United States*, 28 Ct. Cl. 30, 35 (1892).[4]

Nor is service by military officers as "additional judges" of the CMCR under 10 U.S.C. § 950f(b)(3) "otherwise authorized by law." Congress added that clause in 1956 to reflect the fact that "other laws enacted after the date of enactment of [5 U.S.C. § 5534a] authorize the performance of the functions of certain civil offices." 10 U.S.C. § 3544 (1958) (Historical and Revision Notes). What these other laws have in common is clear and unambiguous indicia of Congress's intent to override the dual-officeholding ban. *See, e.g.*, *id.* § 528 (expressly allowing appointment of certain military officers to positions within the CIA or the Office of the Director of National Intelligence). *See generally* 1983 OLC Memo, *supra*, at 16–17 n.21 (collecting examples); Dwan V. Kerig, *Compatibility of Military and Other Public Employment*, 1 MIL. L. REV. 21, 85 (1958) (same).

As OLC concluded in 1979, the policy behind the dual-officeholding ban "cannot be overcome implicitly by a broad and vague statutory authority to designate

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Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2621 (formerly codified at 10 U.S.C. § 950f(b)).

4. Notwithstanding the breadth of the term "civil office," the CMCR tersely concluded in *Al-Nashiri* that its judges do not hold a "civil office" under § 973(b) because "[d]isposition of violations of the law of war by military commissions is a classic military function." Pet. App. 30a.

[a civil officer] in the absence of express language stating that such designation is to be effective notwithstanding the mandate of 10 U.S.C. § 973(b)." 1979 OLC Memo, *supra*, at 150; *see also id.* ("Where Congress wishes to permit a military officer to occupy a civilian position . . . without forfeiting his commission, it has done so explicitly.").

In contrast, the MCA says nothing about appointing military officers, as such, to serve in a "civil office" as "additional judges" under 10 U.S.C. § 950f(b)(3). The only language in § 950f that refers to military officers is the authority provided to the Secretary of Defense to "*assign* persons who are appellate military judges to be judges on the [CMCR]" so long as they are "commissioned officer[s] of the armed forces." 10 U.S.C. § 950f(b)(2) (emphasis added).

Section 950f(b)(3), in contrast, includes no similar indicia of legislative intent. This Court has recognized a well-settled—and constitutionally significant—difference between the words "assign" and "appoint" in this context. Thus, the fact that § 950f(b)(2) refers only to the former "negates any permissible inference that Congress intended that military judges should receive a second *appointment*, but in a fit of absentmindedness forgot to say so." *Weiss*, 510 U.S. at 172 (emphasis added). The MCA's reference in § 950f(b)(2) to "appellate military judges" therefore comes nowhere near to providing the type of specific authorization required for active-duty military officers to also hold office as "additional judges" under § 950f(b)(3). *See, e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is

generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

This understanding is confirmed by the history of § 950f(b), the language of which was first enacted in the 2006 MCA—under which the CMCR was not a court of record. If Congress did not express an intent to override § 973(b) when it created the CMCR in 2006, such an intent cannot be inferred from reenactment of the same language as part of its 2009 overhaul of the MCA.

Despite these understandings, three of the five judges currently appointed to the CMCR also serve as active-duty military officers (and, indeed, active judges of the Army Court of Criminal Appeals), regularly hearing cases on both courts. This Petition, like the petitions in *Dalmazzi* and *Cox*, calls upon the Court to determine the legality and constitutionality of this novel arrangement.

B. Procedural History

Petitioner, an Airman First Class in the U.S. Air Force, was convicted of knowingly and wrongfully viewing, possessing, and distributing child pornography in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. He was sentenced to a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances, and reduction in rank. Because of the sentence, his appeal was referred to the Air Force Court of Criminal Appeals (AFCCA).

On June 1, 2016, a three-judge AFCCA panel that included Judge Mitchell summarily rejected Petitioner's appeal. Pet. App. 23a. Judge Mitchell had also been serving on the CMCR since October 28,

2014, when he was "assigned" to that court under 10 U.S.C. § 950f(b)(2). But after the D.C. Circuit in *Al-Nashiri* called into question the constitutionality of such an "assignment," he was nominated by President Obama under 10 U.S.C. § 950f(b)(3) to an "appointment" as an "additional judge" on the CMCR. 162 CONG. REC. S1474 (daily ed. Mar. 14, 2016) (nomination of Col. Mitchell to be CMCR judge "under 10 U.S.C. Section 950f(b)(3)"). The Senate confirmed him on April 28, 2016. *Id.* at S2600 (daily ed. Apr. 28, 2016) (reporting confirmation). President Obama signed Judge Mitchell's commission on May 25, 2016. *See United States* v. *Dalmazzi*, 76 M.J. 1, 3 (C.A.A.F. 2016), *petition for cert. filed*, No. 16-961 (U.S. filed Feb. 1, 2017).

Although Judge Mitchell began to "exercise the functions" of his appointed CMCR judgeship no later than May 2, 2016 (when he participated in an order in a pending case), *see* Pet. App. 33a, there is no question that, at least by the time of the AFCCA's June 1, 2016 decision in Petitioner's case, he *held* the office of "additional judge" on the CMCR, since President Obama had signed his commission one week earlier, on May 25. *See Dalmazzi*, 76 M.J. at 3. As a result of this timing, Petitioner's case became the occasion for the Court of Appeals to reach the merits of the dual-officeholding claims it had sidestepped in *Dalmazzi*.

On February 9, 2017 (two days after hearing oral argument), the Court of Appeals issued a terse "order and judgment" providing only that "the decision of the Air Force Court of Criminal Appeals is hereby affirmed," and that "[t]he opinion of the Court will be issued on a future date." Pet. App. 16a. That opinion subsequently issued on April 17, 2017. *Id.* at 1a

Writing for a unanimous court, Judge Stucky first rejected Petitioner's claim that Judge Mitchell's appointment to the CMCR disqualified him from continuing to serve on the AFCCA. In particular, the court's analysis turned on two conclusions about the 1983 amendments to § 973(b), which were enacted as part of the Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, § 1002(a), 97 Stat. 614, 655 (1983).

First, the Court of Appeals noted that the 1983 amendments had deleted language from the version of § 973 then in force that had required the automatic termination from the military of anyone who violated the dual-officeholding ban. *See* 10 U.S.C. § 973(b) (1982) ("The acceptance of such a civil office or the exercise of its functions by such an officer terminates his military appointment."). The court reasoned that Congress, by deleting this language, "aimed at the holding of 'civil office' . . . rather than the performance of assigned military duty." Pet. App. 9a. Thus, § 973(b) "might prohibit Judge Mitchell from holding office at the USCMCR . . . but nothing in the text suggests that it prohibits Judge Mitchell from carrying out his assigned military duties at the CCA." *Id.*

This reading was confirmed, in the Court of Appeals' view, by Congress's simultaneous addition of a "saving" clause, § 973(b)(5), which provides that "[n]othing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties," 10 U.S.C. § 973(b)(5) (2012), and which "applies by its terms to Judge Mitchell's assigned official duties at the CCA." Pet. App. 9a. Thus, although Judge Mitchell's appointment to the CMCR might very well have violated the dual-officeholding ban, the Court of

Appeals held this was not a basis upon which to challenge his continuing service on the AFCCA. *See* Pet. App. 13a ("The prohibition in § 973(b)(2)(A)(ii) may indeed affect Colonel Mitchell's status as a judge of the USCMCR, but that is not for us to decide.").

Turning to Petitioner's Appointments Clause objection to Judge Mitchell's simultaneous service on both the AFCCA and CMCR, the Court of Appeals held that there was no problem with such dual service—or with having someone who has principal officer status as an "additional judge" on the CMCR sitting alongside inferior officers on the AFCCA. *See* Pet. App. 11a–12a ("When Colonel Mitchell sits as a CCA judge, he is no different from any other CCA judge under Article 66 [of the UCMJ]. The Judge Advocate General's administrative supervision of the CCA is limited even as to the CCA, and has no authority or effect on the judicial or administrative functions of the USCMCR.").

REASONS FOR GRANTING THE PETITION

I. The Lower Courts Have Adopted Erroneous and Inconsistent Readings of the Dual-Officeholding Ban

The Court of Appeals' ruling in this case was the second appellate decision to consider whether Judge Mitchell's appointment to the CMCR violated § 973(b), along with the CMCR's own decision in *Al-Nashiri* (in which Judge Mitchell participated). *See* Pet. App. 25a; *see also ante* at 8 n.4. Although both courts rejected such a challenge, they did so for reasons that are independently unconvincing and mutually inconsistent.

In *Al-Nashiri*, for example, the CMCR concluded that its "additional judges" do not hold a "civil office"

because they are exercising "a classic military function." Pet. App. 31a. In *Ortiz*, by contrast, CAAF suggested that "Section 973 *might* prohibit Judge Mitchell from holding office *at the USCMCR*," Pet. App. 9a (emphases added), but held that his CMCR appointment did not disqualify him from continuing to sit on the Air Force CCA because "the current statute neither requires the retirement or discharge of a service member who occupies a prohibited civil office," thanks to the 1983 amendments thereto. *Id.* Neither of these arguments is consistent with the text, history, or purpose of § 973(b)—or with the consistent interpretations that provision has long received from both the Justice Department and the Comptroller General.

Taking the CMCR's analysis first, as explained above, an "additional judge" sitting on the CMCR unquestionably holds a "civil office" within the meaning of § 973(b), a term that has long received "a very liberal interpretation." *Ante* at 6 (quoting *Army Officer Holding Civil Office*, 18 OP. ATT'Y GEN. 11, 12 (1884)). OLC has suggested the statutory prerequisite is satisfied so long as "the position is one established by statute, and . . . its duties involve the exercise of 'some portion of the sovereign power.'" 1983 OLC Memo, *supra*, at 24. It is therefore irrelevant whether, as the CMCR held, "[d]isposition of violations of the law of war by military commissions is a classic military function." Pet. App. 30a–31a. As OLC has explained, "the applicability of the prohibition was not to depend on whether the duties of the civil office were undertaken in obedience to military orders." 1983 OLC Memo, *supra*, at 16. But even if it is relevant to the definition of "civil office" that "[d]isposition of violations of the law of war by military commissions is

a classic military function" (and it is not), this characterization is not a fair summary of the work of the CMCR itself, as opposed to the trial-level military commissions that sit at Guantánamo.[5]

Although the Court of Appeals' analysis in this case merits more attention, its interpretation of § 973 rests on a significant over-reading of the purpose and impact of the 1983 amendments to § 973(b). To begin with, the Court of Appeals misread the plain text of the saving clause, which insulates "any action undertaken by an officer in furtherance of *assigned* official duties." 10 U.S.C. § 973(b)(5) (emphasis added). After the 1983 OLC Memo concluded that the longstanding practice of assigning military lawyers to serve as Special Assistant U.S. Attorneys (SAUSAs) to prosecute offenses committed by civilians on military installations violated § 973(b), Congress both narrowed the scope of "civil office" to exclude SAUSAs and insulated the thousands of prosecutions undertaken by those "assigned" officers from legal challenge. *See* Pet. App. 8a & n.1.

In other words, the focus of § 973(b)(5) was on duties carried out by military officers in civil offices to which they had unlawfully been "assigned" under the pre-1983 version of § 973(b), such as the JAG lawyers' service as SAUSAs. Because the 1983 amendments

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5. The CMCR hears *appeals* from such dispositions as an Article I court of record, which is not "classic" as military commissions have only been subject to direct appellate review since 2005. *See Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864). Nor is it "inherently military," as the CMCR includes civilian judges and has exercised jurisdiction over non-law-of-war offenses. *See Bahlul* v. *United States*, 840 F.3d 757 (D.C. Cir. 2016) (en banc) (per curiam), *petition for cert. filed*, No. 16-1307 (U.S. Mar. 28, 2017).

prospectively limited the definition of "civil office" to positions generally requiring an "election" or an "appointment," the saving clause's reach was, in practice, retroactive. *See Reserve Officer Holding Civil Office*, 4 CIV. L. OP. JAG A.F. 391, 391 (Feb. 14, 1991) (holding that clause applied to insulate service in a civil office only prior to September 24, 1983—the date on which § 973(b)(5) entered into force).

The Court of Appeals mistakenly read the 1983 amendments to have done much more—and to have effectively repealed § 973(b)'s prohibitions altogether. On its view, the saving clause would permit military officers to accept prohibited civil offices—or even elective office—and continue to serve on active duty without any consequence. In addition to its inconsistency with the text and purpose of the 1983 amendments, this reading is also internally incoherent; application of the saving clause to the *military* office would be pointless if the sole penalty for violating § 973(b) were, as the Court of Appeals concluded, disqualification from the unauthorized *civil* office.

The Court of Appeals' reasoning also assumes, despite the absence of any indicia of such legislative intent, that Congress intended to abrogate the common law doctrine of incompatibility. *See Lopez* v. *Martorell*, 59 F.2d 176, 178 (1st Cir. 1932) ("[A]n office holder was not ineligible to appointment or election to another incompatible office, but acceptance of the latter vacated the former. This rule is of great antiquity in the common law . . . ."). *But see Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of

long-established and familiar principles, except when a statutory purpose to the contrary is evident.").

Not only do the text and legislative history of the 1983 amendments evince no such congressional purpose, they point rather squarely in the opposite direction. Thus, the same section of the statute that amended § 973(b) separately authorized the President to appoint an active-duty military officer to serve as Chairman of the Red River Compact Commission, and provided that his acceptance of such an appointment "shall not terminate or otherwise affect [his] appointment as a military officer," Department of Defense Authorization Act, 1984, § 1002(d), 97 Stat. at 656; *see also* S. REP. NO. 98-174, at 258 (1983).

On the Court of Appeals' reading, this proviso was wholly unnecessary. But Congress clearly disagreed, and the Department of Defense has disagreed as well; it continues to view administrative separation as the proper sanction for a violation of § 973(b) absent special circumstances not present here. *See* Political Activities by Members of the Armed Forces, Dep't of Def. Directive 1344.10, § 4.6, at 9 (Feb. 19, 2008). Indeed, there would have been no need for the 2016 OLC Memo considering "whether a military officer may continue on terminal leave after he is appointed to a federal civilian position covered by 10 U.S.C. § 973(b)(2)(A)," 2016 OLC Memo, *supra*, at 1, if that officer was otherwise not subject to military separation. Thus, the appropriate remedy for the violation of § 973(b) in petitioner's case is the nunc pro tunc disqualification of Judge Mitchell from service on the AFCCA. *See Ryder* v. *United States*, 515 U.S. 177, 184–85 (1995).

Given the gravity of the dual-officeholding issue, and the depth of its impact on pending cases within both the court-martial and military commissions systems, such a flawed interpretation of § 973(b)'s ban is worthy of this Court's review on its own terms. But certiorari is especially warranted because of the incongruity between the Court of Appeals' analysis in this case and the CMCR's reasoning in *Al-Nashiri*: The CMCR is of the view that its "additional judges" do not hold a "civil office" at all; the Court of Appeals is of the view that "additional judges" of the CMCR very well *may* hold such an office, but "that is not for us to decide," Pet. App. 13a, because any remedy for a violation of the dual-officeholding ban rests with the CMCR. *See id.* Such buck-passing by these two appellate courts does not settle the statutory questions raised in these cases. If anything, it simply adds to the continuing uncertainty over the status of the CMCR's military-officer judges, and underscores the urgency of having the matter resolved by this Court.

II. The Lower Courts' Interpretations Have Raised, Rather than Resolved, Serious Constitutional Questions

Beyond rendering inconsistent verdicts on the statutory objection to Judge Mitchell's dual officeholding, both appeals courts have also given short shrift to the significant constitutional problems that their statutory readings would necessarily provoke under both the Appointments Clause and the Commander-in-Chief Clause of Article II. Indeed, the constitutional questions raised by Judge Mitchell's dual officeholding not only provide a reason to conclude that his appointment to the CMCR

terminated his military service, but they also provide an independent justification for this Court's review.

The Court of Appeals rejected Petitioner's Appointments Clause objection, contending it wrongly "presumes that Col. Mitchell's status as a principal officer on the USCMCR somehow carries over to the CCA, and invests him with authority or status not held by ordinary CCA judges." Pet. App. 11a. In the Court of Appeals' view, there is no Appointments Clause problem anytime an Executive Branch principal officer also holds a separate position as an Executive Branch inferior officer.

The difficulty with this reasoning is that, in the process, the Court of Appeals ignored the possibility that the two positions, while not formally incompatible, might be functionally incompatible. After all, if an additional judge of the CMCR (as a principal officer) could serve alongside a judge of the AFCCA (as an inferior officer), the same logic would allow the President to nominate (and the Senate to confirm) the sitting Secretary of Defense to serve on the AFCCA. But in that scenario, there is an obvious "incongruity" in having an individual with such authority (1) serving in a second position through which he is subordinate to other Executive Branch officers; while at the same time (2) sharing decisionmaking authority with inferior officers who may well be unduly influenced by his principal office. *Cf. Morrison* v. *Olson*, 487 U.S. 654, 675–76 (1988) (discussing the prospect of functional incompatibility through the "incongruity" of the overlapping functions (quoting *Ex parte Siebold*, 100 U.S. 371, 398 (1880))). This concern is especially acute where, as here, the distinct offices involve overlapping personnel—in contrast to circumstances in which an individual

holds offices in two completely unrelated Executive Branch entities.

Whether such an arrangement rises to the level of functional incompatibility that is prohibited by the Appointments Clause (if not the separation of powers more generally) is a difficult question of first impression. *Cf. Nguyen* v. *United States*, 539 U.S. 69 (2003) (interpreting statutes to prohibit Article III and Article IV federal judges from serving on same court of appeals panel); *id.* at 83 n.17 (suggesting that allowing such mixed panels would "call into serious question the integrity as well as the public reputation of judicial proceedings"). It is also one that can easily be avoided here, by interpreting Judge Mitchell's appointment to the CMCR as terminating his military commission and therefore disqualifying him from continuing to serve on the AFCCA. *See Ryder*, 515 U.S. at 184–85. Either way, it is a question that deserves far more careful consideration and scrutiny than that provided by the Court of Appeals (to say nothing of the CMCR).

Moreover, neither the Court of Appeals nor the CMCR even *noted*, let alone resolved, the serious Commander-in-Chief Clause problem that arises from Judge Mitchell's service on the CMCR—since CMCR judges appointed under 10 U.S.C. § 950f(b)(3) "may be removed by the President only for cause and not at will." *Khadr*, 823 F.3d at 98. They thus "cannot . . . be removed by the President except [for] . . . inefficiency, neglect of duty, or malfeasance in office," *i.e.*, they have "good-cause tenure." *Free Enterprise Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 487, 493 (2010).

If a CMCR judge is a civilian, this good-cause tenure protection raises no constitutional problem. But where, as here, the judge at issue is an active-duty military officer, such a constraint on the President's power raises constitutional concerns of the first order. *E.g.*, *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850) ("As commander in chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual[.]"). Indeed, it is well settled that it would be unconstitutional for Congress to "insulate [a military] officer from presidential direction or removal." David Barron & Martin Lederman, *The Commander-in-Chief at Its Lowest Ebb: A Constitutional History*, 121 HARV. L. REV. 941, 1103–04 (2008). Yet if the dual-officeholding ban does *not* prohibit active-duty military officers from serving as CMCR judges, then the good-cause removal protection provided by 10 U.S.C. § 950f(b)(3) would have exactly that unconstitutional effect.

III. Only this Court Can Conclusively Settle the Questions Presented

Finally, there is no reason to believe that further litigation in the lower courts is likely to remedy the statutory errors—or to provide answers to the serious constitutional questions—outlined above. The Court of Appeals considers the matter settled, as it has cleared its docket of the 100-plus cases that raise dual-officeholding questions. *See* C.A.A.F., Daily Journal (May 2017), http://www.armfor.uscourts.gov/newcaaf/journal/2017Jrnl/2017May.htm (last visited May 17, 2017). There is also no obvious mechanism for military commission defendants to challenge the CMCR's ruling in *Al-Nashiri* until after a conviction is

affirmed by a CMCR panel that includes an active-duty military officer, which could be years away.[6] And the government has also now argued to the CMCR that "[i]t is unclear whether a criminal defendant would [even] have standing to obtain disqualification of a judge on [Commander-in-Chief Clause] grounds." Appellant's Response to Appellee Mohammad's Motion to Disqualify at 4, *United States* v. *Mohammad*, No. 17-002 (Ct. Mil. Comm'n Rev. filed May 15, 2017). Simply put, absent this Court's intervention, the problematic impasse summarized above is likely to persist, all while more and more cases implicating these defects arise.

Finally, if Petitioner is correct that the appropriate remedy for Judge Mitchell's violation of the dual-officeholding ban is his termination from the military nunc pro tunc, that remedy is beyond the Court of Appeals' power to direct. *See Clinton* v. *Goldsmith*, 526 U.S. 529, 535 & n.7 (1999). Of course, that fact poses no obstacle to Petitioner's ability to obtain the specific relief he seeks—Judge Mitchell's disqualification from his AFCCA panel. But it does underscore, more broadly, the extent to which only

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6. Although the D.C. Circuit has appellate jurisdiction over the CMCR, that jurisdiction only extends to appeals from "a final judgment rendered by a military commission (as approved by the convening authority and, where applicable, as affirmed or set aside as incorrect in law by the [CMCR])." 10 U.S.C. § 950g(a); *see Khadr* v. *United States*, 528 F.3d 1112 (D.C. Cir. 2008).

Thus, the CMCR's rejection of the dual-officeholding challenge in *Al-Nashiri*, *see ante* at 8 n.4, is effectively unreviewable by the D.C. Circuit until after the CMCR has ruled on Nashiri's (or another affected defendant's) post-conviction appeal—which may not be for many years. *See In re Al-Nashiri*, 835 F.3d 110, 134 (D.C. Cir. 2016), *petition for cert. filed*, No. 16-8966 (U.S. filed Jan. 17, 2017).

this Court can conclusively resolve the recurring and thorny questions raised by the appointment of active-duty military officers as CMCR judges.

* *

The merits of the questions presented deserve plenary briefing and argument. Because the government has opposed certiorari in *Dalmazzi* and *Cox* on threshold procedural issues as well as the merits, *see* U.S. *Dalmazzi* Brief, at 22, the Court should grant all three Petitions. If it agrees with the petitioners in *Dalmazzi* and *Cox* that the threshold issues pose no obstacle to reaching the merits, this petition can be consolidated with those for purposes of briefing and argument. If, instead, it agrees with the government on either of the threshold questions, then, as the government itself all-but concedes, this case becomes the best vehicle for reaching and resolving the merits. *See id.* at 22. Either way, certiorari is clearly warranted here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 19, 2017

APPENDIX

No. 16-__

IN THE

Supreme Court of the United States

KEANU D.W. ORTIZ,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES, Appellee
v.

Keanu D. W. ORTIZ, Airman First Class
U.S. Air Force, Appellant

No. 16-0671

Crim. App. No. 38839

United States Court of Appeals for the Armed Forces

Argued February 7, 2017

Decided April 17, 2017

Military Judge: L. Martin Powell

For Appellant: *Major Lauren A. Shure* (argued); *Major Johnathan D. Legg* and *Brian L. Mizer*, Esq. (on brief).

For Appellee: *Major G. Matt Osborn* (argued); *Colonel Katherine E. Oler* and *Gerald R. Bruce*, Esq. (on brief).

Amici Curiae for Appellee: *Colonel Mark H. Sydenham, Lieutenant Colonel A. G. Courie III, and Major Anne C. Hsieh* (on brief)—*for Army Government Appellate Division. Colonel Valerie C. Danyluk*, USMC, *Lieutenant Commander Justin C. Henderson*, JAGC, USN, *Lieutenant James M. Belforti*, JAGC, USN, *and Brian K. Keller*, Esq. (on brief)—for Navy-Marine Corps Appellate Government Division.

Amicus Curiae in Support of Neither Party: *Philip Sundel,* Esq. (argued); *Brigadier General John G. Baker,* USMC, and *Captain Brent G. Filbert,* JAGC, USN (on brief) —for Military Commissions Defense Organization.

Judge STUCKY delivered the opinion of the Court, in which Chief Judge ERDMANN, and Judges RYAN, OHLSON, and SPARKS, joined.

Judge STUCKY delivered the opinion of the Court.

While he was serving as a judge on the United States Court of Military Commission Review (USCMCR), under an appointment by the President with the advice and consent of the Senate, Colonel Martin T. Mitchell simultaneously served as an appellate military judge on the panel of the United States Air Force Court of Criminal Appeals (CCA) that reviewed Appellant's case. We granted review of two issues: (1) whether his simultaneous service on the two courts violated the Appointments Clause of the Constitution; and (2) whether he was statutorily barred from sitting on the CCA. We specified an additional issue, asking whether Colonel Mitchell's appointment to the USCMCR made him a principal officer in light of 10 U.S.C. § 949b(4)(C), (D) (2012), which authorize the Secretary of Defense to reassign or withdraw appellate military judges from the USCMCR.

We hold that Appellant is not entitled to relief because the applicable statute, 10 U.S.C. § 973(b) (2012), does not by its terms terminate Colonel Mitchell's position as an appel-late military judge on the CCA, and because, in any event, the statute saves Colonel Mitchell's actions in Appellant's case. We further hold that Colonel Mitchell's status as re-gards the CCA does not violate the Constitution's Appointments Clause. U.S. Const. art. II, § 2, cl. 2. In light of these holdings, we need not answer the specified issue.

I. Procedural History

A military judge sitting alone convicted Appellant, consistent with his pleas, of knowingly and wrongfully viewing, possessing, and distributing child pornography. Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2012). The convening authority approved the adjudged sentence: a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The CCA affirmed in a summary disposition. *United States v. Ortiz*, No. 38839, 2016 CCA LEXIS 337, 2016 WL 3681307 (A.F. Ct. Crim. App. June 1, 2016).

II. Background

In the Military Commissions Act of 2009, Pub. L. No. 111-84, div. A., tit. XVIII, § 1802, 123 Stat. 2190, 2603 (2009), Congress established the United

States Court of Military Commission Review (USCMCR). 10 U.S.C. § 950f(a) (2012). As amended in 2011, Pub. L. No. 112-81, § 1034(c), 125 Stat. 1573 (2011), the USCMCR was to consist of "one or more panels, each composed of not less than three judges on the Court." 10 U.S.C. § 950f(a) (2012). The Secretary of Defense was authorized to "assign persons who are appellate military judges" to the USCMCR as "judges." § 950f(b)(2). The President was authorized to "appoint, by and with the advice and consent of the Senate, additional judges to the [USCMCR]." § 950f(b)(3).

In June 2013, the Judge Advocate General of the Air Force detailed Lieutenant Colonel Martin T. Mitchell to serve as an appellate military judge on the CCA. Judge Mitchell was promoted to the rank of colonel in June 2014. The Secretary of Defense assigned Colonel Mitchell to be a judge on the USCMCR on October 28, 2014.

In *In re Al-Nashiri*, the U.S. Court of Appeals for the District of Columbia Circuit expressed concern over whether judges on the USCMCR were principal officers, in which case the assignment of appellate military judges to that position

by the Secretary of Defense would violate the Appointments Clause of the Constitution. 791 F.3d 71, 82 (D.C. Cir. 2015) (citing U.S. Const. art. II, § 2, cl. 2). The court suggested that "the President and the Senate could decide to put to rest any Appointments Clause questions regarding the [US]CMCR's military judges by ... re-nominating and reconfirming the military judges to be [*US*]*CMCR judges*." *Id.* at 86.

Apparently in response to *In re al-Nashiri*, the President nominated Colonel Mitchell for appointment as an appellate military judge on the USCMCR. The Senate received the President's nomination on March 14, 2016. 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016). The Senate gave its advice and consent to the appointment of Martin T. Mitchell as colonel on April 28, 2016. 162 Cong. Rec. S2600 (daily ed. Apr. 28, 2016). Colonel Mitchell took the oath of office of "Appellate Judge" of the USCMCR on May 2, 2016. On May 25, 2016, President Obama signed Colonel Mitchell's commission appointing him to be "an Appellate Military Judge of the United States Court of Military Commission Review."

United States v. Dalmazzi, 76 M.J. 1, 2 (C.A.A.F. 2016).

Judge Mitchell was one of three appellate military judges to participate in the Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012), review of Appellant's case. Unlike in *Dalmazzi*, how-ever, the CCA's opinion in Appellant's case was issued after the President appointed Colonel Mitchell to the USCMCR, and so the issues are not moot. *See* 76 M.J. at 3.

III. Statutory Issue

The first assigned issue is:

> Whether United States Court of Military Commission Review Judge, Martin T. Mitchell, is statutorily authorized to sit as one of the Air Force Court of Criminal Appeals judges on the panel that decided Appellant's case.

Appellant contends that the position of judge on the USCMCR is a civil office, that by accepting such a position Colonel Mitchell's commission as a regular Air Force officer was terminated as a matter of law, and that the UCMJ does not authorize the Judge Advocates General to assign as judges to the Courts of Criminal Appeals those who have been appointed as judges of the USCMCR.

A regular officer of an armed force on the active duty list may not, "[e]xcept as otherwise authorized by

law, ... hold, or exercise the functions of, a civil office in the Government of the United States ... (ii) that requires an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A) (2012).

From its enactment in 1870, the statute provided that "any such officer accepting or exercising the functions of a civil office shall at once cease to be an officer of the army, and his commission shall be vacated thereby." Act of July 15, 1870, ch. 294, § 18, 16 Stat. 319. *See also* R.S. tit. xiv, ch. 1, § 1222 (2d ed. 1878). That statute was replaced in 1968, with one that stated the "acceptance of such a civil office or the exercise of its functions by such an officer terminated his military appointment." Pub. L. No. 90-235, § 4, 81 Stat. 753, 759 (1968). The statute was substantially amended in 1983. Pub. L. No. 98-94, tit. X, pt. A, § 1002, 97 Stat. 614, 655 (1983). The language automatically terminating the officer's military appointment was repealed and a savings clause was added: "Nothing in this subsection shall be construed to in-validate any action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. § 973(b)(5). However, the fundamental prohibition on the holding of a civil office was retained. 10 U.S.C. § 973(b)(2)(A).

We decide questions of statutory construction de novo. *United States v. Schloff*, 74 M.J. 312, 313 (C.A.A.F. 2015). From the earliest times, we have held to the "plain meaning" method of statutory interpre-

tation. Under that method, if a statute is unambiguous, the plain meaning of the words will control, so long as that meaning does not lead to an absurd result. *United States v. Kearns*, 73 M.J. 177, 181 (C.A.A.F. 2014); *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012); *United States v. Graham*, 16 M.J. 460, 462–66 (C.M.A. 1983); *United States v. Dickerson*, 6 C.M.A. 438, 449–50,20 C.M.R. 154, 165–66 (1955). The essential question underlying the first assigned issue is whether Judge Mitchell's appointment to the USCMCR terminated his military com-mission and thereby nullified his participation in any case at the CCA. We hold that it did not.

The 1983 amendments to the statute were occasioned by an opinion of the Justice Department's Office of Legal Counsel, which opined that the longstanding practice of appointing military judge advocates as Special Assistant U.S. Attorneys violated § 973.[1]

While there is much that is unsettled about this situation, the aim of the statute is clear. The evil sought to be protected against is the unauthorized holding of civil office by officers of the armed forces on

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[1] The report language on the provision does not go beyond that situation. S. Rep. No. 98-174, at 22?–34 (1983), *as reprinted in* 1983 U.S.C.C.A.N. 1081, 1122–24. However, in view of the unambiguous nature of the statutory language, resort to legislative his-tory is unnecessary.

active duty, which is thought to threaten "civilian supremacy in the conduct of governmental affairs." S. Rep. No. 98-174, at 232 (1983), *as reprinted in* 1983 U.S.C.C.A.N. 1081, 1122. Thus, the prohibitions in the statute are aimed at the holding of "civil office" (here, civil office requiring presidential appointment with Senate advice and consent) rather than the performance of assigned military duty. Section 973 might prohibit Judge Mitchell from holding office at the USCMCR—a question that is not before us—but nothing in the text suggests that it prohibits Judge Mitchell from carrying out his assigned military duties at the CCA. The wording of the savings clause at subsection (b)(5), "Nothing in this subsection shall be construed to invalidate any action taken by an officer in furtherance of assigned official duties" comports with this interpretation, and applies by its terms to Judge Mitchell's assigned official duties at the CCA.

Contrary to Appellant's argument, the current statute neither requires the retirement or discharge of a service member who occupies a prohibited civil office, nor operates to automatically effectuate such termination. The language supporting Appellant's argument was expressly repealed over thirty years ago. Accordingly, Judge Mitchell's military commission, and therefore, his service on the CCA, was un-affected by his appointment to the USCMCR.

IV. Appointments Clause

The second assigned issue is as follows:

> Whether Judge Martin T. Mitchell's service on both the Air Force Court of Criminal Appeals and the United States Court of Military Commission Re-view violates the Appointments Clause given his status as a principal officer of the United States Court of Military Commission Review.

The Appointments Clause of the Constitution provides that the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

U.S. Const. art. II, § 2, cl. 2.

Appellant alleges that Congress intended to establish the USCMCR as an independent Article I court and protected its judges from removal other than for cause. He then argues that assigning a principal officer appointed to the USCMCR with advice and consent to a CCA with inferior officers violates the

Appointments Clause. This is because mixing principal and inferior officers on a CCA allows the Judge Advocates General to "exercise an indirect veto" over the principal officers on the CCA. The CCA, according to this argument, can be "packed" by the assignment of military officers and the appointment of a chief judge.[2] Article 66, asserts Appellant, "is being implemented in a way that puts military officers, and by extension the Judge Advocate General, in the position to exercise a formal supervisory authority over the lone principal officer on the CCA."

The problem with this argument is that it presumes that Colonel Mitchell's status as a principal officer on the USCMCR somehow carries over to the CCA, and invests him with authority or status not held by ordinary CCA judges. That is not the case. One is a principal or an inferior officer by virtue of appointment and exercise of the duties of the office. When Colonel Mitchell sits as a CCA judge, he is no different

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[2] The brief asserts that, unless appointed by the President with advice and consent, CCA judges must be military officers. It cites *United States v. Janssen*, 73 M.J. 221, 225 (C.A.A.F. 2014) for that proposition. That is not what *Janssen* held. The case held that civilians appointed to the CCAs must be appointed in one of the methods set out in the Appointments Clause *for inferior officers*. In the case of the appointment at issue in *Janssen*, there was no statutory authority for such appointment. The lack of such authority was the reason for requiring the default method of presidential appointment with advice and consent to be used.

from any other CCA judge under Article 66. The Judge Advocate General's administrative supervision of the CCA is limited even as to the CCA, *see Edmond v. United States*, 520 U.S. 651, 664 (1997), and has no authority or effect on the judicial or administrative functions of the USCMCR. The scheme devised by Congress and the Executive is not illogical in a situation in which service as a USCMCR judge is perforce a part-time activity. *See In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016) (stating that the USCMCR "is an unusual court in that its caseload depends on the number of military commission proceedings appealed to it. At any given time, therefore, the Court's judges may have very little to do"). Just as military officers on active du ty hold three- and four-star ranks only while assigned to billets carrying those ranks, *see* 10 U.S.C. § 601 (2012), so Colonel Mitchell and the others similarly placed enjoy the perquisites of office only while exercising the functions of the office. We see no Appointments Clause problem from the point of view of Colonel Mitchell's exercising the functions of an appellate military judge under Article 66.

It is important to note what we need not and do not decide here. First, we decide no statutory issue beyond that set out above. We do not decide whether the USCMCR is a prohibited civil office or whether it is "authorized by law" ac-cording to § 973. On the statutory issue, we simply hold that § 973 does not operate to invalidate the actions military officers appointed to civil office take in furtherance of their military duties

or to require the retirement or discharge of these officers. The prohibition in § 973(b)(2)(A)(ii) may indeed affect Colonel Mitchell's status as a judge of the USCMCR, but that is not for us to decide.

Second, we decide no issue under the Constitution's Appointments Clause beyond that treated above. We intimate no opinion as to the jurisdiction, functions, or operation of the USCMCR, or Colonel Mitchell's membership on it. By virtue of his presidential appointment to the USCMCR, Colonel Mitchell may well be a principal officer; certainly, the Executive's response to *al-Nashiri* would seem to indicate an executive intent to treat these appointees as principal officers, but that is a question for another day, as are any Appointments Clause questions pertaining to the USCMCR in its earlier incarnation.

Finally, we need not decide the specified issue, which again goes to Colonel Mitchell's status as a principal officer vel non on the USCMCR.

IV. JUDGEMENT

The judgment of the United States Air Force Court of Criminal Appeals is affirmed.

UNITED STATES, Appellee
v.

Keanu D. W. ORTIZ, Airman First Class
U.S. Air Force, Appellant

No. 16-0671

Crim. App. No. 38839

United States Court of Appeals for the Armed Forces

JUDGMENT

[STAMPED MANDATE
ISSUED: 4/28/17
By: Signature of Clerk of Court
OPINION ATTACHED]

This cause came before the Court on appeal from the United States Air Force Court of Criminal Appeals and was argued by counsel on February 7, 2017. On consideration thereof, it is, by the Court, this 17th day of February, 2017,

ORDERED and ADJUDGED:

The decision of the United States Air Force Court of Criminal Appeals is hereby affirmed in accordance with the opinion filed herein this date.

[STAMPED: UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

CERTIFIED TO BE A TRUE COPY OF THE JUDGMENT

SIGNATURE
WILLIAM A. DECICCO
CLERK
DATE: APRIL 28, 2017]

FOR THE COURT

William A. DeCicco
Clerk of the Court

UNITED STATES, Appellee
v.

Keanu D. W. ORTIZ, Airman First Class
U.S. Air Force, Appellant

No. 16-0671

Crim. App. No. 38839

United States Court of Appeals for the Armed Forces

ORDER AND JUDGMENT

On consideration of the briefs of the parties, the briefs of *amici curiae*, and oral argument, it is, by the Court, this 9th day of February, 2017,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed. The opinion of the Court will be issued on a further date. C.A.A.F. R. 43(b). A petition for reconsideration may be filed no later than 10 days after the date of the issuance of said opinion.

FOR THE COURT

William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Air Force

Appellate Defense Counsel (Shure)
Appellate Government Counsel (Osborn)
Amici Curiae (Baker, Hsieh, Henderson)

UNITED STATES, Appellee
v.

Keanu D. W. ORTIZ, Airman First Class
U.S. Air Force, Appellant

No. 16-0671

Crim. App. No. 38839

United States Court of Appeals for the Armed Forces

ORDER

On further consideration of the granted issues in the above-entitled case (Daily Journal, October 27, 2017), it is, by the Court, this 16th day of December, 2016,

ORDERED:

That Issue II is hereby amended as follows:

II. WHETHER JUDGE MARTIN T. MITCHELL'S SERVICE ON BOTH THE AIR FORCE COURT OF CRIMINAL APPEALS AND THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW VIOLATES THE APPOINTMENTS CLAUSE GIVEN HIS STATUS AS A **PRINCIPAL** OFFICER ON THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW.

That the petition for grant of review is also granted on the following specified issue:

III. WHETHER JUDGE MARTIN T. MITCHELL WAS IN FACT A PRINCIPAL OFFICER FOLLOWING HIS APPOINTMENT BY THE PRESIDENT TO THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW IN LIGHT OF THE PROVISIONS OF 10 U.S.C. § 949b(4)(C) AND (D), AUTHORIZING REASSIGNMENT OR WITHDRAWAL OF APPELLATE MILITARY JUDGES SO APPOINTED BY THE SECRETARY OF DEFENSE OR HIS DESIGNEE.

That the parties will file contemporaneous briefs and a joint appendix on the granted issues as amended and the specified issue on or before January 24, 2017;

That reply briefs will not be filed; and

That *amicus curiae* briefs under Rule 26(a)(1) will be filed on or before January 24, 2017, and motions for leave to file *amicus curiae* briefs under Rule 26(a)(3) will be filed on or before January 17, 2017. Should said motions be granted, *amicus curiae* briefs under Rule 26(a)(3) will also be filed on or before January 24, 2017

FOR THE COURT

William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Shure)
Appellate Government Counsel (Osborn)

UNITED STATES, Appellee
v.

Keanu D. W. ORTIZ, Airman First Class
U.S. Air Force, Appellant

No. 16-0671

Crim. App. No. 38839

United States Court of Appeals for the Armed Forces

ORDER GRANTING REVIEW

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 27th day of October, 2016,

ORDERED:

That said petition is hereby granted on the following issues:

I. WHETHER UNITED STATES COURT OF MILITARY COMMISSION REVIEW JUDGE, MARTIN T. MITCHELL, IS STATUTORILY AUTHORIZED TO SIT AS ONE OF THE AIR FORCE COURT OF CRIMINAL APPEALS JUDGES ON THE PANEL THAT DECIDED APPELLANT'S CASE.

II. WHETHER JUDGE MARTIN T. MITCHELL'S SERVICE ON BOTH THE AIR FORCE COURT OF

CRIMINAL APPEALS AND THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW VIOLATES THE APPOINTMENTS CLAUSE GIVEN HIS STATUS AS A SUPERIOR OFFICER ON THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW.

No briefs will be filed under Rule 25.

FOR THE COURT

William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Shure)
Appellate Government Counsel (Osborn)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class KEANU D.W. ORTIZ
United States Air Force

ACM 38839

1 June 2016

Sentence adjudged 15 April 2015 by GCM convened at Minot Air Force Base, North Dakota. Military Judge: L. Martin Powell (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Captain Lauren A. Shure.

Appellate Counsel for the United States: Gerald R. Bruce, Esquire.

Before

ALLRED, MITCHELL, and MAYBERRY
Appellate Military Judges

OPINION OF THE COURT

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

PER CURIAM:

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are AFFIRMED.

[SEAL] FOR THE COURT

LEAH M. CALAHAN
Clerk of the Court

[DEPARTMENT OF DEFENSE SEAL]

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES,
Appellant
v.
ABD AL RAHIM HUSSAYN MUHAMMAD AL-NASHIRI,
Appellee

ORDER

LIFTING STAY
AFFIRMING PRIOR ORDERS
DENYING DISQUALIFICATION AND RECUSAL MOTIONS
SETTING ORAL ARGUMENT

CMCR CASE NO. 14-001

May 18, 2016

BEFORE:
MITCHELL, PRESIDING Judge
KING, SILLIMAN Judges

On October 15, 2014, appellant requested oral argument. On October 16, 2014, appellee replied and

did not object to oral argument. Oral argument was scheduled for November 13, 2014.

On October 14, 2014, appellee filed a petition for a writ of mandamus and prohibition in the Court of Appeals for the District of Columbia Circuit asking that court to order the disqualification of Judges Weber and Ward, the two military judges then on the panel assigned to hear the appeal. Appellee contended their assignment by the Secretary of Defense to our court violates the Commander-in-Chief Clause and the Appointments Clause of the U.S. Constitution. *See* Appellee's Pet. for Writ of Mandamus & Prohibition, *In re Al-Nashiri,* No. 14-1203 (D.C. Cir. Oct. 14, 2014).

On the eve of the oral argument, the Court of Appeals for the District of Columbia Circuit granted a stay in the proceedings for the purpose of giving it sufficient opportunity to consider appellee's mandamus petition. Order, *In re Al-Nashiri,* No. 14-1203 (D.C. Cir. Nov. 12, 2014).

On June 23, 2015, the Court of Appeals for the District of Columbia Circuit denied the appellee' s mandamus petition, remanded the case back to our court, and lifted that Court's stay. *In re Al-Nashiri,* 791 F .3d 71 (D .C. Cir. 2015); Order, *In re Al-Nashiri,* No. 14-1203 (D.C. Cir. June 23, 2015).

On June 26, 2015, we granted the requests to hold this case in abeyance pending possible presiden-

tial nomination and Senate confirmation of the military appellate judges. *See In re Al-Nashiri,* 791 F.3d at 86 (suggesting such nomination and confirmation would "put to rest any Appointments Clause questions"). On March 14, 2016, the Senate received the nominations of Judges Mitchell and King to our court.[1] The Senate confirmed Judges Mitchell and King on April 28, 2016, 2 and they were sworn as USCMCR judges on May 2, 2016.[2]

On April 29, 2016, appellant requested that we lift the stay and reaffirm our previous orders. Our court issued several procedural orders involving stays, extensions, recusals, and assignment of judges as well as the following substantive orders: granting on September 25, 2014, appellant's motion for leave to file an outsized brief; denying on October 6, 2014, appellee's motion to recuse the two military judges on the panel,

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[1] *See* 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016) (indicating receipt of President's nominations of Colonel Martin T. Mitchell, U.S. Air Force, and Captain Donald C. King, U.S. Navy, as appellate military judges on the United States Court of Military Commission Review).

[2] U.S. Cong., Nominations of 114th Cong., PN 1219, https://www.congress.gov/nomination/114th-congress/1219 (Judge Mitchell), and PN 1224, https://www.congress.gov/nomination/114thcongress/1224 (Judge King). (Encl. I, 2)

alleging they were assigned to the USCMCR in violation of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and could not be freely removed in violation of the Commander-in-Chief Clause, *id.* cl. 1; denying on October 6, 2014, appellee's motion to "terminate the devolution of its judicial responsibilities onto the Clerk of Court."; denying on October 10, 2014, appellee's motion to dismiss the appeal as untimely; and granting on October 20, 2014, appellant's motion to attach documents to the appendix accompanying its brief.

On April 30, 2016, appellee filed an unopposed request for an extension until May 16, 2016, to respond to appellant's motion, and we approved the extension request.

On May 16, 2016, we received appellee's response. Appellee moved to continue the stay; to disqualify the military judges, Judges Mitchell and King; and to recuse Judges Mitchell and King from deciding the disqualification motion. As one of several alternatives to disqualification, Appellee seeks an order "confirming Col Mitchell and CAPT King's newfound civilian status[.]" Appellee cites 16 Cong. Rec. 2599 (daily ed. Apr. 28, 2016)[3] and 10 U.S.C. 973(b) as the basis

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[3] The language of the 16 Cong. Rec. 2599 (daily ed. Apr. 28, 2016) is that the Senate confirmed the "Air Force nomination of Martin T. Mitchell, to be colonel"

for disqualification. Appellee's reading of Cong. Rec. 2599 is taken out of context. PN 1219 and 1224 contain the complete description of the nomination and confirmation process. Moreover, the Senate previously confirmed Judge Mitchell to Colonel, and Judge King to Captain more than two years ago. On April 28, 2016, the Senate confirmed Judges Mitchell and King as appellate military judges in accordance with the Secretary of Defense's recommendation and the President's nomination. *See* note 2, *supra.*

Appellee's reading of Cong. Rec. 2599 is taken out of context. PN 1219 and 1224 contain the complete description of the nomination and confirmation process.

Title 10 U.S.C. § 973(b)(2)(A) provides, "Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States-- ... (ii) that requires an appointment by the President by and with the advice and consent of the Senate." Appellate military judges are specifically authorized by law under 10 U.S.C. § 950f(b)(2), and 10 U.S.C. § 973(b)(2) does not prohibit Judges Mitchell and King from acting as appellate military

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and "Navy nomination to Donald C. King, to be Captain." It mirrors the closing phrase of PN 1219 and 1224.

judges.[4] Title 10 U.S.C. §§ 950f(b)(2) and 973(b)(2) do not define the term "civil office", and there is no evidence that Congress intended commissioned officers appointed as appellate military judges to the Court of Military Commission Review to occupy a civil office.[5] The 2009 Military Commissions Act states, "The Court shall consist of one or more panels, each composed of not less than three appellate military judges." 10 U.S.C. § 950f(a). Military commissions are used "to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission." 10 U.S.C. § 948b(a). Disposition of violations of the law of war by military commissions

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[4] Title 10 U.S.C. § 950f(b)(2) states, "The Secretary of Defense may assign persons who are appellate military judges to be judges on the Court. Any judge so assigned shall be a commissioned officer of the armed forces, and shall meet the qualifications for military judges prescribed by section 948j(b) of this title."

[5] *See* Department of Defense Directive Number 1344.10, Political Activities by Members of the Armed Forces (Feb. 19, 2008) Section E2.3. (defining "civil office" as "A non–military office involving the exercise of the powers or authority of civil government, to include elective and appointed office in the U.S. Government, a U.S. territory or possession, State, county, municipality, or official subdivision thereof. This term does not include a non elective position as a regular or reserve member of civilian law enforcement, fire, or rescue squad.").

is a classic military function and Judges Mitchell and King do not occupy a "civil office" when serving as appellate military judges on the Court of Military Commission Review.

Therefore, it is hereby

ORDERED that appellant's April 29, 2016 request to lift our stay of litigation of appellant's appeals, which were initially filed on September 19, 2014 and March 27, 2015, is GRANTED.

ORDERED that appellant's motion that we reconsider the orders our Court previously decided in this case is GRANTED.

ORDERED that orders our Court previously decided are AFFIRMED.

ORDERED that Judges Mitchell and King have considered appellee's May 16, 2016 motion to recuse. Judges Mitchell and King have declined to recuse themselves. The motion to recuse is DENIED.

ORDERED that appellee's May 16, 2016 motion to disqualify Colonel Mitchell and Captain King is DENIED.

ORDERED that oral argument will be heard at 10:00 a.m. Eastern Time on June 2, 2016, in Courtroom 201, United States Court of Appeals for the Federal Circuit, 717 Madison Place, NW, Washington, DC.

FOR THE COURT:

//signature//
Mark Harvey
Clerk of Court,
U.S. Court of Military Commission Review

[DEPARTMENT OF DEFENSE SEAL]

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES,
Appellant
v.
ABD AL RAHIM HUSSAYN MUHAMMAD AL-NASHIRI,
Appellee

ORDER

CMCR CASE NO. 14-001

May 2, 2016

BEFORE:
MITCHELL, PRESIDING Judge
KING, SILLIMAN Judges

On June 26, 2015, appellant filed an unopposed motion moving "the Court to stay the proceedings while it explores options for re-nomination and reconfirmation of the military judges as U.S.C.M.C.R. judges." Appellant explained that the stay sought is for all litigation on the two government appeals filed with our Court. Appellee did not object to the suspension of proceedings.

By a series of orders, our Court ordered the continued suspension of the hearing schedule and oral argument. The President nominated, and on March 14, 2016, the Senate confirmed Judges Mitchell and King. On April 29, 2016, appellant requested that we lift the stay and reaffirm our previous orders and decisions. On April 30, 2016, appellee filed an unopposed request for an extension until May 16, 2016, to respond to appellant's motion.

Therefore, it is hereby

ORDERED that the suspension of the briefing schedule and oral argument is continued in this case. Appellee's motion to delay responding to appellant's April 29, 2016 motion until May 16, 2016 is GRANTED.

FOR THE COURT:

//signature//
Mark Harvey
Clerk of Court,
U.S. Court of Military Commission Review

Copy to:
Convening Authority, OMC
Judges Listed
Appellate Counsel

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
AUG 18 2017
OFFICE OF THE CLERK

No. 16-1423

In the Supreme Court of the United States

KEANU D.W. ORTIZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Acting Solicitor General
Counsel of Record
DANA J. BOENTE
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JOSEPH F. PALMER
DANIELLE S. TARIN
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QUESTIONS PRESENTED

1. Whether 10 U.S.C. 973(b), which provides that, except as otherwise authorized by law, a military officer may not hold a "civil office" that requires a presidential appointment with Senate confirmation, prohibits a military officer from serving simultaneously as a presidentially appointed judge on the United States Court of Military Commission Review (USCMCR) and an appellate military judge on a service court of criminal appeals.

2. Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, bars a military officer from serving simultaneously as a presidentially appointed judge on the USCMCR and an appellate military judge on a service court of criminal appeals.

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In the Supreme Court of the United States

No. 16-1423

KEANU D.W. ORTIZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-13a) is reported at 76 M.J. 189. The opinion of the United States Air Force Court of Criminal Appeals (Pet. App. 23a-24a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on February 9, 2017, with an opinion issued on April 17, 2017. On April 26, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 9, 2017. The petition was filed on May 19, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner was convicted by a military court-martial of knowingly and wrongfully viewing, possessing, and distributing child pornography, in violation of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934. He was sentenced to a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances, and a reduction in grade. The convening authority approved the sentence. The United States Air Force Court of Criminal Appeals (AFCCA) affirmed. The United States Court of Appeals for the Armed Forces (CAAF) granted a petition for discretionary review and affirmed. Pet. App. 1a-22a.

1. This case presents the question whether petitioner is entitled to a new hearing before the AFCCA because the panel that decided his appeal included a military judge who had also been appointed to the United States Court of Military Commission Review (USCMCR).

a. Congress established the USCMCR in the Military Commissions Act of 2009 (MCA), Pub. L. No. 111-84, Div. A, Tit. XVIII, 123 Stat. 2574. The USCMCR is an intermediate appellate tribunal for military commissions, performing a function analogous to the one served for courts-martial by the AFCCA and the other service courts of criminal appeals. See 10 U.S.C. 950f(a). The USCMCR's decisions are reviewed by the D.C. Circuit. See *In re al-Nashiri*, 791 F.3d 71, 74-75 (D.C. Cir. 2015).

The MCA authorizes both military officers and civilians to serve as judges on the USCMCR. 10 U.S.C. 950f(b). The Secretary of Defense may "assign persons who are appellate military judges to be judges on the [USCMCR]." 10 U.S.C. 950f(b)(2). A person so assigned must be a commissioned officer in the armed forces. *Ibid.*

In addition, the President may "appoint, by and with the advice and consent of the Senate, additional judges," who are not required to be military officers. 10 U.S.C. 950f(b)(3); see *al-Nashiri*, 791 F.3d at 74-75.

The USCMCR's jurisdiction is limited to reviewing military commission proceedings. Because of that specialized docket, there are times when "the Court's judges may have very little to do." *In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016). "Consistent with that reality, the military judges who serve on the [USCMCR] also continue to serve on the military appeals courts from which they are drawn." *Ibid.*

b. In November 2014, a military commission defendant, Abd Al-Rahim Hussein Muhammed al-Nashiri, petitioned the D.C. Circuit for a writ of mandamus seeking disqualification of the military USCMCR judges hearing an interlocutory appeal in his case. Among other things, al-Nashiri argued that appellate military judges assigned to the USCMCR are principal officers under the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, who must be appointed by the President and confirmed by the Senate to their positions on that court. *al-Nashiri*, 791 F.3d at 73, 75.

The D.C. Circuit denied the petition, holding that al-Nashiri had not established the "clear and indisputable" right required for mandamus relief. *al-Nashiri*, 791 F.3d at 85-86. The D.C. Circuit did not decide whether USCMCR judges are, in fact, principal officers. *Ibid.* It also did not decide whether, if they are, the Appointments Clause requires judges previously appointed as commissioned military officers by the President with the advice and consent of the Senate to be appointed a second time specifically to the USCMCR. *Ibid.* But the

D.C. Circuit observed that "the President and the Senate could decide to put to rest any Appointments Clause questions regarding the [US]CMCR's military judges" by nominating and confirming them under 10 U.S.C. 950f(b)(3). *al-Nashiri*, 791 F.3d at 86.

c. "The President chose to take that tack" as a prophylactic measure, without conceding that it was constitutionally required. *In re al-Nashiri*, 835 F.3d 110, 116 (D.C. Cir. 2016), petition for cert. pending, No. 16-8966 (filed Jan. 17, 2017). In April 2016, the Senate confirmed the two military judges on al-Nashiri's panel to the USCMCR. *Ibid.*

A few weeks later, al-Nashiri moved in the USCMCR to disqualify the military judges on his panel based on 10 U.S.C. 973(b)(2), which provides that, unless "otherwise authorized by law," a military officer may not hold a "civil office" that "requires an appointment by the President by and with the advice and consent of the Senate." He argued that Section 973(b)(2) barred military officers from being appointed as USCMCR judges. Pet. App. 28a-29a. The USCMCR denied the motion, holding that military officers' service on the USCMCR is "authorized by law" because the MCA specifically authorizes military officers to be judges on that court. *Id.* at 29a (citing 10 U.S.C. 950f(b)(2)). The USCMCR also held that a USCMCR judgeship is not a "civil office" covered by Section 973(b)(2) because "[d]isposition of violations of the law of war by military commissions is a classic military function." *Id.* at 30a-31a.

al-Nashiri sought a writ of mandamus from the D.C. Circuit based on his claim that Section 973(b)(2) bars military officers from being appointed to the USCMCR.

The D.C. Circuit denied the petition in a per curiam order. *In re al-Nashiri*, No. 16-1152 Docket entry No. 1615339 (May 27, 2016).

d. In May 2017, another military commission defendant, Khalid Shaikh Mohammad, moved to disqualify the military USCMCR judges hearing an interlocutory appeal in his case. Joined by four co-defendants, Mohammad raised, among other issues, the same statutory claims al-Nashiri had raised in his case. The USCMCR denied the motion, reaffirming its prior holdings and reiterating that a USCMCR judgeship is not a "civil office" covered by Section 973(b)(2) because "[i]t is beyond dispute that military commissions are primarily a military function with a direct connection to the law of war." Order at 6, *United States* v. *Mohammad*, No. 17-002 (June 21, 2017).

2. Petitioner, a serviceman in the Air Force, was convicted before a military court-martial of viewing, possessing, and distributing child pornography. Pet. App. 3a. Petitioner appealed his conviction to the AFCCA, and the appeal was assigned to a panel that included Colonel Martin T. Mitchell, an appellate military judge who was also serving on the USCMCR by virtue of an assignment by the Secretary of Defense, and who was later appointed to the USCMCR by the President with the advice and consent of the Senate. *Id.* at 3a-6a. The AFCCA issued a judgment affirming petitioner's conviction and sentence after Judge Mitchell had been appointed by the President. *Id.* at 6a.

3. Petitioner sought discretionary review in the CAAF. The CAAF granted review limited to two issues: (1) whether 10 U.S.C. 973(b) bars an appellate military judge from serving simultaneously on a service

court of criminal appeals and as a presidentially appointed USCMCR judge, and (2) whether such simultaneous service violates the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. Pet. App. 2a; see *id.* at 2a, 13a (noting the CAAF's specification of an additional issue that it did not ultimately reach).

The CAAF first held that petitioner was not entitled to relief under 10 U.S.C. 973(b). Pet. App. 6a-9a. The court concluded that even if Judge Mitchell's position on the USCMCR were a "civil office," and even if his appointment to that office were not "otherwise authorized by law" under 10 U.S.C. 973(b)(2)(A), any violation of Section 973(b) would not affect Judge Mitchell's service on the AFCCA. Pet. App. 8a-9a. The court observed that although Section 973(b) prohibits military officers from holding certain civil offices, it "neither requires the retirement or discharge of a service member who occupies a prohibited civil office, nor operates to automatically effectuate such termination." *Id.* at 9a. The court accordingly reasoned that, even if Section 973(b) "prohibit[ed] Judge Mitchell from holding office at the USCMCR," it would not "prohibit[] [him] from carrying out his assigned military duties at the [AF]CCA." *Ibid.* The CAAF also reasoned that petitioner's challenge was foreclosed by Section 973(b)'s savings clause, which provides that "[n]othing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. 973(b)(5); see Pet. App. 9a.

The CAAF next held that Judge Mitchell's simultaneous service on the AFCCA and the USCMCR did not violate the Appointments Clause. Pet. App. 9a-12a. The court assumed without deciding that the judges of the USCMCR are principal officers. *Id.* at 13a. But the

court rejected petitioner's argument that it would violate the Appointments Clause for a person who serves as a principal officer on the USCMCR to serve on the AFCCA, where he is subject to supervision by other officers. *Id.* at 11a-12a; cf. *Edmond* v. *United States*, 520 U.S. 651, 666 (1997) (holding that judges on a service court of criminal appeals "are 'inferior Officers' within the meaning of [the Appointments Clause]"). The court explained that petitioner's argument erroneously "presum[ed] that [the officer's] status as a principal officer on the USCMCR somehow carries over to the [AF]CCA, and invests him with authority or status not held by ordinary [AF]CCA judges." Pet. App. 11a. In fact, the court concluded, "[t]hat is not the case." *Ibid.* The court explained that even if an officer appointed to the USCMCR is a principal officer when acting in his capacity as a judge on that court, "[w]hen [the officer] sits as a [AF]CCA judge, he is no different from any other [AF]CCA judge." *Id.* at 11a-12a. The court thus saw "no Appointments Clause problem" with simultaneous service. *Id.* at 12a.

ARGUMENT

Petitioner renews his contention (Pet. 13-23) that he is entitled to a new hearing before the AFCCA because the panel that decided his appeal included a military judge who had also been appointed to the USCMCR. Petitioner asserts that such simultaneous service violates 10 U.S.C. 973(b) and the Appointments Clause of the Constitution. The CAAF correctly rejected those arguments, and its decision does not conflict with any

decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.[1]

1. Section 973(b) provides that, "[e]xcept as otherwise authorized by law," military officers may not "hold, or exercise the functions of, a civil office" that "requires an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. 973(b)(2)(A)(ii). Petitioner asserts (Pet. 13-18) that Section 973(b) bars a military officer from serving on the AFCCA after being appointed to the USCMCR by the President, and further contends that the asserted violation of Section 973(b) invalidates the AFCCA's decision in his case. That is incorrect for four independent reasons: (a) military officers are "authorized by law" to serve as judges on the USCMCR; (b) the position of USCMCR judge is not a "civil office" under Section 973(b); (c) an appointment by the President, with the advice and consent of the Senate, is not "require[d]" for a military officer to serve on the USCMCR; and (d) petitioner would not be entitled to relief even if he were correct that simultaneous service on the AFCCA and the USCMCR violates Section 973(b) because the statute expressly provides that it shall not "be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties," 10 U.S.C. 973(b)(5). A claim that fails on so many independent grounds does not warrant this Court's review—particularly where, as here, none of

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[1] The questions presented in this case are also presented in several other pending petitions for writs of certiorari. See *Alexander* v. *United States*, No. 16-9536 (filed May 16, 2017); *Cox* v. *United States*, No. 16-1017 (filed Feb. 21, 2017); *Dalmazzi* v. *United States*, No. 16-961 (filed Feb. 1, 2017). Some of those petitions also present threshold procedural questions that are not presented here.

those grounds is the subject of any disagreement in the lower courts.

a. Section 973(b)(2) does not prohibit a military officer from holding a covered civil office if the officer is "authorized by law" to do so. 10 U.S.C. 973(b)(2)(A). Here, the MCA expressly authorizes the Secretary of Defense to assign "appellate military judges" to the USCMCR and requires that "[a]ny judge so assigned shall be a commissioned officer of the armed forces." 10 U.S.C. 950f(b)(2); see *In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016) ("The [MCA] authorizes both military judges and civilians to serve on the [USCMCR]."). By providing that one of the two mechanisms for USCMCR judges to be selected applies only to military officers, Congress made clear that military officers are "authorized by law" to serve on that court. Consistent with that statutory authorization, the overwhelming majority of the USCMCR's judges have been military officers. *Khadr*, 823 F.3d at 96.

Petitioner contends (Pet. 8-9) that the MCA is insufficiently "clear and unambiguous" to provide the necessary "authoriz[ation] by law" for military officers to serve on the USCMCR. But nothing in Section 973(b)(2) imposes or suggests the clear-statement rule that petitioner advocates. And even if such clarity were necessary, it would be supplied by the MCA's express requirement that all judges assigned to the USCMCR under Section 950f(b)(2) *must* be military officers, as well as by other provisions of the MCA that plainly contemplate that USCMCR judges may be military officers.[2]

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[2] See, *e.g.*, 10 U.S.C. 949b(b)(4) (providing that the Secretary of Defense may reassign appellate military judges on the USCMCR to other duties "in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member" if

Petitioner appears to acknowledge (Pet. 9) that Section 950f(b)(2) clearly and unambiguously authorizes military officers to be assigned to be judges on the USCMCR. But he asserts (*ibid.*) that similar authorization is absent from Section 950f(b)(3), which allows the President to "appoint, by and with the advice and consent of the Senate, additional judges to the [USCMCR]." In other words, petitioner asserts that military officers are authorized to serve as "judges" assigned to the USCMCR under Section 950f(b)(2) (and thus may do so consistent with Section 973(b)), but are *not* authorized to serve as "additional judges" appointed to the USCMCR under Section 950f(b)(3).

Petitioner's attempt to distinguish between "judges" and "additional judges" lacks any statutory basis. Section 950f creates a single office—"judge[] on [the USCMCR]." 10 U.S.C. 950f(a). It then provides that "[j]udges on the Court shall be assigned or appointed" in either of two ways. 10 U.S.C. 950f(b)(1). But the availability of two modes of designation does not transform one statutory office into two. Judges designated under Section 950f(b)(3) are numerically "additional," but substantively identical, to judges designated under Section 950f(b)(2). And because Congress expressly provided that "appellate military judges" may serve as "judges on the [USCMCR]," 10 U.S.C. 950f(b)(2), their service in that office is "authorized by law" regardless of the mechanism by which they are designated to serve.

b. In any event, even if military officers were not "authorized by law" to serve as USCMCR judges, their service in that position would not violate Section 973(b)

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the reassignment is "based on military necessity and * * * is consistent with service rotation regulations").

because the position of USCMCR judge is not a "civil office" within the meaning of Section 973(b)(2). As the USCMCR has explained, adjudication of violations of the law of war by military commissions is "a classic military function." Pet. App. 30a-31a; see William Winthrop, *Military Law and Precedents* 835 (2d ed. 1920) (noting that "military commissions * * * have invariably been composed of commissioned officers of the army").

Petitioner observes (Pet. 14-15) that USCMCR judges do not themselves preside over military commissions. But they review military commissions' dispositions, a function that is consistent with the well-recognized role of military officers in administering the law of war and that in no way threatens the "civilian preeminence in government" that Section 973(b)(2) is designed to protect. *Riddle* v. *Warner*, 522 F.2d 882, 884 (9th Cir. 1975); see *id.* at 884-885 (holding that the office of notary public is not a "civil office" because military judge advocates have traditionally served as notaries within the military and because service in that office does not undermine the purposes of Section 973(b)).

In arguing otherwise, petitioner appears to assume (Pet. 7) that a position qualifies as a "civil office" under Section 973(b) whenever: (1) it is established by statute, and (2) "its duties involve the exercise of 'some portion of the sovereign power.'" But petitioner ignores the additional requirement that the position must be *civil*, not military. The various opinions on which petitioner relies (Pet. 6-7) addressed positions that were not military in nature, and those opinions thus principally asked

whether the relevant position carried sufficient governmental authority to qualify as a "civil office."[3] The question here is different. There is no doubt that, like many officials who perform military duties, USCMCR judges hold a position established by statute and exercise some sovereign power. But they do not hold a "civil office" because they act pursuant to military, rather than civil, authority.

Petitioner's sweeping reading of "civil office" would mean that quintessential military offices, such as appellate military judgeships on the service courts of criminal appeals, are "civil office[s]" merely because the positions are established by statute and involve exercising government power. Petitioner cites no authority endorsing that understanding of Section 973(b).

c. An additional reason that the prohibition in Section 973(b) does not bar military officers from serving as USCMCR judges is that the office of USCMCR judge does not "require[] an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. 973(b)(2)(A)(ii). The MCA expressly provides that "[t]he Secretary of Defense may assign persons who are appellate military judges to be judges on the

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[3] See 44 Comp. Gen. 830, 830-832 (1965) (concluding that an Army Officer could not serve as "a special policeman in the Library of Congress"); Office of Legal Counsel, *Applicability of 10 U.S.C. § 973(b) to JAG Officers Assigned to Prosecute Petty Offenses Committed on Military Reservations* 28-29 (May 17, 1983) (holding that military officers could not serve as Special Assistant United States Attorneys prosecuting "offenses against the civil laws of the United States" under authority that "derives not from any military source but from the Attorney General"); see also *Army Officer Holding Civil Office*, 18 Op. Att'y Gen. 11, 12-13 (1884) (holding that an Army officer could not serve on a board to report to the City of Philadelphia on "the defects of the present system of paving the streets").

[USCMCR]." 10 U.S.C. 950f(b)(2). That alternative mode of designating judges makes clear that the position of USCMCR judge does not "require" a presidential appointment. And although the President responded to the D.C. Circuit's decision in *al-Nashiri* by appointing military judges to the USCMCR with the advice and consent of the Senate, no court has held that such an appointment is constitutionally required. See *In re al-Nashiri*, 791 F.3d 71, 81-86 (D.C. Cir. 2015) (declining to resolve that "question[] of first impression"). Petitioner suggests (Pet. 6) that the government has conceded this issue, but in fact the government has maintained that military officers do not require a separate appointment to serve as USCMCR judges because USCMCR judges are not principal officers. See *al-Nashiri*, 791 F.3d at 83 (noting the government's argument that the USCMCR judges are inferior officers because the Secretary of Defense supervises the court and can remove its military judges).

d. Even if all three of the foregoing arguments are wrong and Section 973(b) prohibits military officers from serving on the USCMCR, the CAAF correctly held that a violation of Section 973(b) would not entitle petitioner to relief. By its terms, Section 973(b) prohibits military officers from serving in specified civil offices, but "nothing in the text suggests that it prohibits" an officer who assumes a prohibited civil office "from carrying out his assigned military duties." Pet. App. 9a. And Section 973(b)'s savings clause expressly forecloses petitioner's attempt to use that provision to overturn the AFCCA decision in his case because it provides that "[n]othing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. 973(b)(5); see Pet.

App. 9a. Judge Mitchell participated in deciding petitioner's appeal "in furtherance of his assigned official duties," and petitioner thus cannot invoke Section 973(b) to challenge the AFCCA's decision.

Petitioner asserts (Pet. 15-16) that Section 973(b)'s savings clause applies only to actions military officers took while holding a prohibited office before the savings clause was added to the statute in 1983. Nothing in the statute supports such a limitation. Although the legislative history of the amendment indicates that the savings clause was added in response to a Justice Department memorandum concluding that military officers could not be appointed as Special Assistant United States Attorneys, Congress did not limit the clause's application to that particular context or make it purely retroactive. To the contrary, Congress broadly provided that "[n]othing in [Section 973(b)] shall be construed to invalidate *any* action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. 973(b)(5) (emphasis added).[4]

Petitioner also asserts (Pet. 16-17) that he is entitled to relief because Congress did not indicate its intent in Section 973(b) to abrogate "the common law doctrine of

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[4] Congress's preservation of the savings clause through multiple post-1983 amendments to Section 973 further undermines petitioner's assertion that the clause should be read to include an atextual limitation to pre-1983 events. See National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, Div. A, Tit. V, § 545, 117 Stat. 1479; Homeland Security Act of 2002, Pub. L. No. 107-296, Tit. XVII, § 1704(b)(1), 116 Stat. 2314; National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, Div. A, Tit. V, § 506, 113 Stat. 591; National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, Div. A, Tit. V, § 556, 104 Stat. 1570.

incompatibility," which petitioner claims requires an office holder to vacate a military office that is incompatible with an office he later assumes. But as the CAAF explained, the 1983 amendment that added the savings clause also repealed language in Section 973(b) that had automatically terminated an officer's military appointment when he assumed a prohibited civil office. Pet. App. 7a-8a. That language had provided that "[t]he acceptance of [a prohibited] civil office or the exercise of its functions by [a covered] officer terminates his military appointment." 10 U.S.C. 973(b) (1982). In repealing that language and adding the savings clause, Congress made clear that it intended to depart from the practice of automatically removing a military officer who assumes a prohibited civil office. See Pet. App. 9a ("The language supporting [petitioner's] argument was expressly repealed over thirty years ago.").

Petitioner errs in asserting (Pet. 16-17) that adhering to the plain language of Section 973(b)(5)'s savings clause would "effectively repeal[] [Section] 973(b)'s prohibitions altogether." The Executive Branch is bound to comply with Section 973(b), and does so. Cf. Pet. 17 (describing actions to ensure compliance and remedy violations). But many statutes that are binding on the Executive Branch do not create privately enforceable rights. And even when they do, Congress may limit private enforcement to particular contexts. Here, the plain terms of the savings clause unambiguously preclude petitioner from using Section 973(b) to invalidate the AFCCA's decision in his case.

e. Finally, petitioner asserts (Pet. 18) that this Court's review is warranted despite the absence of a circuit conflict because of the asserted "incongruity between the [CAAF's] analysis in this case and the

[US]CMCR's reasoning in *Al-Nashiri*." No such incongruity exists. In *al-Nashiri*, the USCMCR held that a military judge's service on that court does not violate Section 973(b) because a USCMCR judgeship is not a "civil office" and because such service is any event "specifically authorized" by the MCA. Pet. App. 29a-30a. The CAAF did not disagree with either of those holdings. To the contrary, it expressly stated that it "d[id] not decide" those issues. *Id.* at 12a. Instead, the CAAF simply held that petitioner would not be entitled to relief even if Judge Mitchell's service on the USCMCR violated Section 973(b). *Id.* at 8a-9a. The fact that two different courts have rejected petitioner's statutory argument on three alternative, independent grounds counsels against review—not in favor of it.

2. Petitioner also contends (Pet. 18-20) that Judge Mitchell's simultaneous service on the AFCCA and the USCMCR violates the Appointments Clause. The CAAF correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals.

a. The Appointments Clause provides that the President shall "nominate, and by and with the Advice and Consent of the Senate, shall appoint * * * Officers of the United States," but that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, Cl. 2. Judge Mitchell holds two distinct offices: He is a judge on the AFCCA, and he separately serves as a judge on the USCMCR. He was placed in each of those offices in a manner consistent with the Constitution.

Petitioner does not and could not contend that Judge Mitchell's original assignment to the AFCCA violated the Appointments Clause. Judges on the AFCCA and the other service courts of criminal appeals "are 'inferior Officers' within the meaning of [the Appointments Clause] by reason of the supervision over their work" by judge advocates general and by the CAAF. *Edmond* v. *United States*, 520 U.S. 651, 666 (1997). This Court has held that, when military judges are "already commissioned officers" and therefore have "already been appointed by the President with the advice and consent of the Senate," the Appointments Clause allows them to be assigned to the service courts of criminal appeals without a "second appointment." *Weiss* v. *United States*, 510 U.S. 163, 170 (1994); see *id.* at 176.

Petitioner also does not appear to contend that there is any Appointments Clause problem with the manner in which Judge Mitchell was appointed to the USCMCR. He asserts (Pet. 5-6) that judges on the USCMCR are principal officers. The government disagrees with that premise. See p. 13, *supra*. But even if petitioner's assertion were correct, Judge Mitchell and the other military judges on the USCMCR have now been appointed to that court in the manner required by the Appointments Clause for principal officers: by the President with the advice and consent of the Senate. See Pet. App. 5a; *In re al-Nashiri*, 835 F.3d 110, 116 (D.C. Cir. 2016), petition for cert. pending, No. 16-8966 (filed Jan. 17, 2017). Those appointments "put to rest any Appointments Clause questions regarding the [US]CMCR's military judges." *al-Nashiri*, 791 F.3d at 86.

b. Unlike a typical Appointments Clause challenge, therefore, petitioner's claim does not rest on an assertion that an individual has been appointed to a federal

office in a manner inconsistent with the Appointments Clause's procedures. His contention is, instead, that it violates the Appointments Clause for a single individual to serve simultaneously as a judge on a service court of criminal appeals (an inferior officer) and as a judge on the USCMCR (according to petitioner, a principal officer). But nothing in the text of the Appointments Clause supports that assertion, and petitioner cites no authority holding that the Appointments Clause prohibits this sort of simultaneous service.

As the CAAF explained, petitioner's arguments appear to "presume[] that [an officer's] status as a principal officer on the USCMCR somehow carries over to the [court of criminal appeals], and invests him with authority or status not held by ordinary [court of criminal appeals] judges." Pet. App. 11a. "That is not the case." *Ibid.* Even if a USCMCR judge were a principal officer when he acted in his capacity as such, "[w]hen [the same individual] sits as an [AF]CCA judge, he is no different from any other [AF]CCA judge." *Id.* at 11a-12a. The officer's status as a USCMCR judge grants him no additional authority on the AFCCA. *Id.* at 12a. Accordingly, to the extent he is supervised by, or otherwise constrained by the actions of, nonprincipal officers when he acts in his capacity as an AFCCA judge, such limitations do not contravene the Appointments Clause. See *ibid.* And, conversely, the officer's status as an AFCCA judge subjects him to no greater supervision when he acts on the USCMCR. *Ibid.*

Petitioner asserts (Pet. 19-20) that simultaneous service on the USCMCR and the AFFCA violates the Appointments Clause because the two positions "might be

functionally incompatible" or because simultaneous service is "incongru[ous]." Neither of the decisions on which petitioner relies support that assertion.

In *Morrison* v. *Olson*, 487 U.S. 654, 675-676 (1988), this Court stated that Congress's decision to vest Article III courts with authority to appoint individuals to a particular office could exceed Congress's authority under the Appointments Clause "if there was some 'incongruity' between the functions normally performed by the courts and their performance of th[at] duty to appoint." *Id.* at 676 (quoting *Ex parte Siebold*, 100 U.S. 371, 398 (1879)). That principle concerns the propriety of a method for appointing individuals to serve in a single office—not any purported "incongruity" in the same individual holding two different offices, or any other issue involving simultaneous service of the sort at issue here.

In *Nguyen* v. *United States*, 539 U.S. 69 (2003), this Court held that an Article IV judge on a territorial court could not sit by designation on a panel of the Ninth Circuit. *Id.* at 71. But the Court's decision rested on a statute requiring that judges sitting by designation be Article III judges—not on the Appointments Clause. *Id.* at 74-77 (citing 28 U.S.C. 292(a)).[5]

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[5] Petitioner also asserts (Pet. 20-21) that the appointment of military officers to the USCMCR raises questions under the Commander-in-Chief Clause, U.S. Const. Art. II, § 2, Cl. 1. But the questions he presents to this Court do not include the Commander-in-Chief claim, which was not passed upon by the court below. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). In addition, petitioner lacks standing to raise that claim because it relates only to the USCMCR and not the AFCCA. And in any event, petitioner's Commander-in-Chief Clause argument lacks merit. Cf. *al-Nashiri*, 791 F.3d at 75, 82 (denying a

In sum, petitioner does not identify any decision, by any court, holding that simultaneous service on the USCMCR and the AFCCA violates the Appointments Clause—or even applying the Appointments Clause to an arguably analogous situation. And petitioner provides no sound reason for this Court to depart from its usual practices by taking up such a novel issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2017

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petition for mandamus raising a similar Commander-in-Chief Clause claim).

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Supreme Court of the United States

KEANU D.W. ORTIZ,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITIONER'S REPLY BRIEF

In its brief in opposition, the government does not dispute that Judge Mitchell's appointment to the Court of Military Commission Review (CMCR) as an "additional judge" under 10 U.S.C. § 950f(b)(3) raises an "important question of federal law that has not been, but should be, settled by this Court," S. Ct. R. 10(c), *i.e.*, whether it triggers the dual-officeholding ban codified at 10 U.S.C. § 973(b)(2). Because § 973(b)(2) is a reflection of the "traditional and strong resistance of Americans to any military intrusion into civilian affairs," *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972), and because this question is the subject of five pending petitions for certiorari encompassing 175 court-martial appeals,[1] it would have been impossible to argue otherwise.

Instead, the government's opposition reduces to the absence of a circuit split and superficially plausible arguments for why Judge Mitchell's CMCR appointment did not disqualify him from hearing Petitioner's appeal to the Air Force Court of Criminal Appeals (CCA). Opp. 8–16. On closer inspection, however, these merits arguments do not withstand scrutiny. And like the Court of Appeals for the Armed Forces (CAAF) in its decision below, the government fails to explain what purpose § 973(b)(2) would serve on its reading, or why Congress in 1983 would have chosen to eviscerate such a major codification of civilian control of the military. Indeed, the disturbing

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1. These questions are also presented in *Dalmazzi* v. *United States*, No. 16-961; *Cox* v. *United States*, No. 16-1017; *Alexander* v. *United States*, No. 16-9536; and *Abdirahman* v. *United States*, No. 17-243. Counsel for Petitioner is also counsel of record in *Dalmazzi*, *Cox*, and *Abdirahman*.

implications of the government's position not just for these cases, but beyond the military justice system, only underscore the need for this Court's intervention.

Finally, as the government concedes, *see* Brief for the United States in Opposition at 22, *Dalmazzi* v. *United States*, No. 16-961 (U.S. filed May 15, 2017); Opp. 8 n.1, this Petition is an appropriate vehicle for deciding the Questions Presented. Although CAAF has continued to grant petitions for review properly raising dual-officeholding claims (thereby protecting this Court's jurisdiction, *see* 28 U.S.C. § 1259(3)), it appears to be doing so only pending the disposition of these cases.

To be sure, the issue may also eventually reach this Court in a case arising from the Guantánamo military commissions. There, the appointment of Judge Mitchell and three other active-duty military officers to the CMCR has created further uncertainty, and the D.C. Circuit is presently considering the issue through a mandamus petition from the alleged masterminds of the September 11 attacks. *See In re Mohammad*, No. 17-1179 (D.C. Cir. filed July 21, 2017).[2] On Petitioner's view of the merits, however, there would be no statutory or constitutional infirmity in these officers' service *as civilians* as "additional judges" on the CMCR under § 950f(b)(3)—a conclusion that provides yet another reason for this Court to grant certiorari here and settle the matter.

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2. The CMCR's unpublished June 21 ruling rejecting the defendants' dual-officeholding claim is reproduced in the Appendix to this brief. *See* Rep. App. 1a.

I. Judge Mitchell's CMCR Appointment Triggered the Dual-Officeholding Ban

The government's brief in opposition offers four arguments for why § 973(b)(2) did not disqualify Judge Mitchell from hearing Petitioner's CCA appeal. It claims that these arguments are "independent," Opp. 16, but they are not. Three of them reduce to the single contention that Judge Mitchell's CMCR appointment did not even trigger § 973(b)(2), because (1) "additional judges" on the Article I CMCR do not hold a "civil office"; (2) even if they did, that office does not "require[] an appointment by the President by and with the advice and consent of the Senate"; and (3) even if it does, Congress has authorized active-duty military officers to receive such an appointment. *Id.* at 8–13. As the Petition demonstrated, these merits-stage arguments are not only unavailing, but also flatly contrary to the government's longstanding interpretations of § 973(b)(2).

1. The most prominent example of this shift is the government's argument that CMCR judges do not hold a "civil office" because the duties of a CMCR judge are "military in nature" and CMCR judges "act pursuant to military, rather than civil, authority." Opp. 11–12. These assertions are factually incorrect and analytically irrelevant.

The CMCR is an Article I "court of record." 10 U.S.C. § 950f(a). In that regard, it is comparable to CAAF, *id.* § 941, and the U.S. Court of Appeals for Veterans' Claims, 38 U.S.C. § 7251—and materially different from the CCAs. *But see* Opp. 12.[3] Thus, the

3. The government's claim that, on Petitioner's reading, CCA judges would hold a "civil office," Opp. 12, is shallow and mistaken. It is the CCAs' structure, not their function, that

implications of the government's position not just for these cases, but beyond the military justice system, only underscore the need for this Court's intervention.

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3. The government's claim that, on Petitioner's reading, CCA judges would hold a "civil office," Opp. 12, is shallow and mistaken. It is the CCAs' structure, not their function, that

CMCR's authority stems from Congress, not the military. *See Freytag* v. *Comm'r*, 501 U.S. 868, 888 (1991) (noting implications of Congress's decision to transform an agency into an Article I court). Nor do CMCR judges exercise a "traditional military function." Pet. 15 & n.5.

The government insists that the Petition cited "no authority endorsing [this] understanding of Section 973(b)." Pet. 12. In fact, the Petition cites the unbroken line of Department of Justice opinions suggesting that an office's substantive function is irrelevant to whether it is a "civil office." Pet. 6–7.

As the Office of Legal Counsel put it in 1983, "the applicability of [§ 973(b)(2)] was not to depend on whether the duties of the civil office were undertaken in obedience to military orders." Pet. 14 (quoting Off. of Legal Counsel, Applicability of 10 U.S.C. § 973(b) to JAG Officers Assigned to Prosecute Petty Offenses Committed on Military Reservations 16 (May 17, 1983) [hereinafter "1983 OLC Memo"]);[4] *see also*

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distinguishes them from the CMCR. Pet. 5. Unlike the CMCR, the CCAs are not Article I "courts of record," and their military judges do not hold a separate "office" in the first place. *See Weiss* v. *United States*, 510 U.S. 163, 170–72 (1994). *But see* Opp. 16 ("Judge Mitchell holds two distinct offices.").

But even if military judges on the CCAs nevertheless did hold a "civil office," it is not one that implicates the dual-officeholding ban, because it does not require nomination by the President and confirmation by the Senate. *See Edmond* v. *United States*, 520 U.S. 651, 661–66 (1997). Indeed, as the Petition explained, Congress added that narrowing requirement to § 973(b)(2) in 1983 entirely *because* "civil office" is interpreted so capaciously. Pet. 6–7.

4. The 1983 OLC Memo is available at https://perma.cc/YLM8-KTR6.

Memorandum for the General Counsel, Gen. Servs. Admin., 3 OP. O.L.C. 148, 150 (1979) ("The Attorneys General . . . have ruled that . . . the policy of the statute points to a very broad interpretation of the term 'civil officer.'"); Army Officer Holding Civil Office, 18 OP. ATT'Y GEN. 11, 12 (1884) ("[T]he policy of [§ 973(b)] points to a very liberal interpretation of the phrase 'civil office.'").[5]

2. The government also maintains that "additional judges" on the CMCR do not hold an office "that requires an appointment by the President by and with the advice and consent of the Senate," § 973(b)(2)(A)(ii), because § 950f(b)(2) authorizes the *assignment* of judges to the CMCR without appointment. As the Petition explained, however, this argument requires ignoring Congress's clear intent to distinguish between "assigned" CMCR judges under § 950f(b)(2) and "additional" CMCR judges appointed under § 950f(b)(3). Pet. 9.

The government does not (and could not) contest that, at the time Judge Mitchell heard Petitioner's appeal, he was serving on the CMCR in the latter capacity—a capacity that, by statute, required presidential nomination and Senate confirmation. *See* § 950f(b)(3). In any event, insofar as CMCR judges are principal Executive Branch officers, if § 950f(b)(3) does not "require[] an appointment by the President by and with the advice and consent of the Senate," § 973(b)(2)(A)(ii), then the Appointments Clause does.

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5. Thus, shortly after § 973(b) was enacted, Attorney General Williams concluded that it would violate § 973(b) for General Sherman to serve on even a temporary basis as Secretary of War. *See* Acting Secretary of War, 14 OP. ATT'Y GEN. 200 (1873).

3. In addition, the government correctly notes that Congress, in § 950f(b)(2), clearly intended that active-duty military officers would be *assigned* to the CMCR. As the Petition demonstrated, however, § 950f(b)(2)'s clear statement to this effect only proves the absence of similar authorization for military officers to be *appointed* as "additional judges" under § 950f(b)(3). Pet. 9–10; *see Weiss*, 510 U.S. at 172 ("This difference negates any permissible inference that Congress intended that military judges should receive a second appointment, but in a fit of absentmindedness forgot to say so."). Tellingly, the government does not argue that Congress has authorized the *appointment* of active-duty military officers to the CMCR as "additional judges" under § 950f(b)(3). Judge Mitchell's appointment to the CMCR as a military officer is therefore not "otherwise authorized by law." § 973(b)(2)(A).

II. 10 U.S.C. § 973(b)(5) Does Not Preclude Judge Mitchell's Disqualification

The government falls back on what CAAF actually held below—that "a violation of Section 973(b) [does] not entitle petitioner to relief." Opp. 13. As the Petition explained, this novel interpretation is based upon a misreading of the text of § 973(b)(5), which provides that "[n]othing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." Pet. 15–17. CAAF's (and the government's) view appears to be that this text thereby immunizes military officers from suffering any sanction for violating the dual-officeholding ban.[6]

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6. To that end, the government has now argued that § 973(b)(5) also precludes challenges to actions undertaken by

As the Petition noted, this argument fails under settled principles of statutory interpretation. Pet. 15–18. But more importantly for present purposes, a contrary conclusion would only bolster, not weaken, the case for granting certiorari.

1. Whereas these cases present the specific issue of active-duty military officers serving as Article I judges, § 973(b) has historically swept far more broadly, limiting the ability of men and women in uniform to simultaneous hold almost all Cabinet positions, thousands of other civil offices within the federal government, and elective office at the state or federal levels. Indeed, the dual-officeholding ban was designed and intended "to assure civilian preeminence in government, *i.e.*, to prevent the military establishment from insinuating itself into the civil branch of government and thereby growing 'paramount' to it." *Riddle* v. *Warner*, 522 F.2d 882, 884 (9th Cir. 1975); *see also* 1983 OLC Memo, *supra*, at 16 ("What was intended was a strict separation of the military and civilian establishment.").

On the government's (and CAAF's) reading of § 973(b)(5), the dual-officeholding ban would no longer be able to serve that vital purpose in any context, let alone with respect to the CMCR.[7] Given the profound implications such an interpretation would portend for

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military officers in unauthorized civil offices, as well. *See* Brief for the United States in Opposition at 20–21, *In re Mohammad*, No. 17-1179 (D.C. Cir. filed Aug. 25, 2017), *available at* https://perma.cc/QS4J-XUYC.

7. In its brief in opposition, the government responds that "[t]he Executive Branch is bound to comply with Section 973(b), and does so." Opp. 15. Regardless of how it is enforced (or by whom), the dual-officeholding ban serves no purpose if, as the government claims, there are no consequences for its violation.

civil-military relations in general, it is self-evident that it should be for this Court to say so. *See Clinton* v. *Goldsmith*, 526 U.S. 529, 536 (1999) (emphasizing CAAF's narrowly circumscribed role, even within the military justice system).

2. In any event, "Congress . . . does not . . . hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). And the text of the statute that created § 973(b)(5) proves that Congress did not intend (or effect) such a sea change in civil-military relations. Taking § 973(b)(5) first, the government makes much out of that provision's reference to "*any* action," Opp. 14, and ignores the qualifier—"in furtherance of assigned official duties."

The government agrees that § 973(b)(5) was prompted by a desire to preclude challenges to criminal convictions obtained by military officers who, prior to the 1983 amendments to § 973(b), had been *assigned* to hold a "civil office" as Special Assistant U.S. Attorneys. *See* Pet. 15–16; Opp. 14. Thus, Congress's focus was on immunizing military officers' actions in the civil office to which they had (unlawfully, as OLC concluded) been assigned, not on actions taken in their military capacity subsequent to their assumption of an unauthorized civil office.[8]

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8. Congress's focus on "assigned" duties also explains why § 973(b)(5) has had only retroactive effect, since it is no longer a violation of § 973(b)(2) for a servicemember to assume a civil office "in furtherance of assigned official duties." Pet. 15–16. The government's only counterargument is that Congress has since amended § 973 without eliminating § 973(b)(5). Opp. 14 n.4, The brief in opposition does not explain how those amendments bear on what Congress intended when it enacted § 973(b)(5).

This reading of § 973(b)(5)'s text is confirmed by two additional provisions of the same statute—neither of which the government acknowledges. First, after amending § 973(b) in section 1002(a) of the Department of Defense Authorization Act for FY1984, Congress separately provided that

> Nothing in [§ 973(b)], as in effect before the date of the enactment of this Act, shall be construed . . . to have terminated the military appointment of an officer of an Armed Force by reason of the acceptance of a civil office, or the exercise of its functions, by that officer *in furtherance of assigned official duties.*

Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, § 1002(b)(2), 97 Stat. 614, 655 (1983) [hereinafter "1983 Act"] (emphasis added). Thus, in the very next subsection of the same statute, Congress used the same phrase ("in furtherance of assigned official duties") to unambiguously refer to actions undertaken by military officers in the civil office to which they were assigned without authorization. *See Atl. Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932) ("[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.").

Second, as the Petition noted, the same section of the 1983 Act also authorized the appointment of an active-duty military officer to the Red River Compact Commission, and specified that acceptance of that appointment "shall not terminate or otherwise affect such officer's appointment as a military officer." § 1002(d), 97 Stat. at 656; *see* Pet. 17. This proviso would have been wholly unnecessary if § 973(b)(5) has

the meaning claimed by CAAF and the government. Instead, it provides further evidence that § 973(b)(5) has no bearing here—and further reason why CAAF's decision to the contrary merits this Court's review.

III. The Decision Below Raises Serious Constitutional Questions

Finally, the government continues to give short shrift to the constitutional problems with Judge Mitchell's dual-officeholding. It is true, as the government argues, that the Petition "cites no authority holding that the Appointments Clause prohibits this sort of simultaneous service." Opp. 18. But that hardly proves the point, since Petitioner is unaware of any prior instance in which the same individual served simultaneously as both an inferior and a principal officer on two different federal courts. *Cf. Free Enterprise Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010) ("Perhaps the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent." (citation and internal quotation marks omitted)). Whether the Constitution allows such an arrangement is, as the Petition admits, a novel question. *See* Pet. 20. It is not at all clear, however, that the answer is yes.

The government also continues to mischaracterize the Commander-in-Chief Clause concerns raised by the decision below—under which military officers *qua* CMCR judges are at once in the chain of command but also the beneficiaries of statutory tenure protection. Pet. 20–21 (citing *In re Khadr*, 823 F.3d 92, 98 (D.C. Cir. 2016)). The government's only responses are that Petitioner lacks standing to press this argument and that the D.C. Circuit has summarily refused to issue

a writ of mandamus in a case in which it was raised. Opp. 19 & n.5. The former contention misses the point and the latter contention is specious.

Petitioner is not claiming that the Commander-in-Chief Clause, if violated, would invalidate Judge Mitchell's participation in his CCA appeal. Pet. 21. The claim, instead, is that each of the interpretations of § 973(b) advanced by CAAF below and the government here raises serious constitutional questions, and that § 973(b) can—and therefore should—be construed by this Court to avoid them. But even if these difficult constitutional questions cannot be avoided, it is this Court that should answer them.

* *

The government does not argue against certiorari because the Questions Presented are unimportant in their substance or limited in their scope. Instead, the case against this Court's intervention rests on a series of novel and narrow interpretations of a 147-year-old statute intended to protect against undue military influence over civilian affairs—a statute the Executive Branch has, until now, always construed broadly in furtherance of that goal.

The government's new position does not just fail to persuade. It has also created avoidable uncertainty in hundreds of pending criminal cases, including the military commission trial of the alleged masterminds of the September 11 attacks. It raises constitutional questions of the first order. And, if the decision below is left intact, it could lead to a fundamental reorientation of civil-military relations, with ramifications far beyond the military justice system. This Court's intervention is therefore not only warranted, but imperative.

CONCLUSION

For the foregoing reasons and those previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 30, 2017

No. 16-1423

IN THE

Supreme Court of the United States

KEANU D.W. ORTIZ,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

APPENDIX TO PETITIONER'S REPLY BRIEF

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UNITED STATES COURT OF MILITARY COMMISSION REVIEW

United States,

Appellant

v.

Khalid Shaikh Mohammad

Walid Muhammad Salih Mubarek Bin 'Attash

Ramzi Bin al Shibh

Ali Abdul-Aziz Ali AKA Ammar al Baluchi, and

Mustafa Ahmed Adam al Hawsawi,

Appellee

ORDER

MOTION TO DISQUALIFY JUDGES SERVING IN VIOLATION OF 10 U.S.C. § 973(B) AND THE COMMANDER-IN-CHIEF CLAUSE OF THE U.S. CONSTITUTION AND TO ABATE UNTIL A PROPERLY CONSTITUTED COURT IS CONVENED

USCMCR CASE NO. 17-002

June 21, 2017

BEFORE:
BURTON, PRESIDING Judge
HERRING, SILLIMAN Judges

On May 8, 2017, Appellee Mohammad moved this Court to disqualify Presiding Judge Burton and Judge Herring from the panel designated to decide this appeal on the grounds that their service on the U.S. Court of Military Commission Review (USCMCR) is in violation of 10 U.S.C. § 973(b) and the Commander-in-Chief Clause of Article II Section 2 of the U.S. Constitution. Appellee Mohammad Motion 1, 14. Appellee Mohammad argued their service on the USCMCR violated the Fifth and Eighth Amendments to the U.S. Constitution. Appellee Mohammad Motion 1.[1] Appellee Mohammad moved "to abate these pro-

[1] In addition, Appellee Mohammad contended that Appellee Mohammad's panel was not properly constituted because 10 U.S.C. 950f(a) required a minimum of *three military* appellate judges on a panel. (emphasis added) Appellee Mohammad Motion 9-11. On December 31, 2011, Congress substituted "judges on the Court" for "appellate military judges" in 10 U.S.C. § 950f(a). P.L. 112-81, Div. A, Title X, Subtitle D, § 1034(c), 125 Stat. 1573 (Dec. 31, 2011). The December 31, 2011 statutory substitution resolved this issue,

ceedings until a properly constituted Court is convened." *Id.* 1, 14. All co-Appellees joined Appellee Mohammad in this motion. On May 15, 2017, Appellant opposed the motion for disqualification and abatement.

Our Court has previously ruled a USCMCR appellate military judge position is not a "civil office" prohibited under 10 U.S.C. § 973(b). *See Order United States v. Al-Nashiri*, No. 14-001 (USCMCR May 18, 2016) (App. A). USCMCR military appellate judges are "authorized by law" and therefore they are not subject to the civil-office prohibition. *Id.* Our Court has also previously decided that assignment of military appellate judges to the USCMCR does not violate the Commander-in-Chief Clause of Article II Section 2 of the U.S. Constitution. *United States v. Khadr*, No. 13-005 (USCMCR Oct. 17, 2014) (App. B). We revisit those issues in this Order, and we arrive at the same holding.

Facts

The Military Commissions Act of 2009 ("2009 M.C.A."), section 950f(a) states, "*Establishment.*—There is a Court of record to be known as the [USCMCR] . . . . The Court shall consist of one or more panels, each composed of not less than three judges on

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and this issue will not receive additional discussion in this Order.

the Court." 10 U.S.C. § 950f(a). The 2009 M.C.A. provided for two ways to assign or appoint judges to the USCMCR:

> (b) *Judges.* (1) Judges on the Court shall be assigned or appointed in a manner consistent with the provisions of this subsection.
>
> (2) The Secretary of Defense may assign persons who are appellate military judges to be judges on the Court. Any judge so assigned shall be a commissioned officer of the armed forces, and shall meet the qualifications for military judges prescribed by section 948j(b) of this title.
>
> (3) The President may appoint, by and with the advice and consent of the Senate, additional judges to the United States Court of Military Commission Review.

10 U.S.C. § 948j(b) states:

> (b) *Eligibility.* A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court, or a member of the bar of the highest court of a State, and who is certified to be

> qualified for duty under section 826 of this title [10 USCS § 826] (article 26 of the Uniform Code of Military Justice) as a military judge of general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member.

On September 10, 2015, Secretary of Defense Ashton B. Carter appointed Lieutenant Colonel Burton and Colonel Herring, who are judges on the Army Court of Criminal Appeals, to the USCMCR under his authority in 10 U.S.C. § 950f(b)(2). Appellee Mohammad App. Tab 1. On September 23, 2015, they were sworn as USCMCR military appellate judges. Appellee Mohammad Motion 2 n.1 (citing Appellee Mohammad App. Tab. 1).

The Court of Appeals for the District of Columbia Circuit considered an Appointments Clause challenge to the Secretary of Defense's assignment of military judges from their Service Courts of Criminal Appeals to sit as USCMCR judges on Al-Nashiri's panel. *In re Al-Nashiri*, 791 F.3d 71, 84 n.7 (D.C. Cir. 2015) The Court said the President could nominate, and the Senate could confirm the military judges to be USCMCR judges to "put to rest any Appointments Clause questions regarding the CMCR's military judges." *Id.* at 86.

In response to the *Al-Nashiri* decision, President Obama nominated Lieutenant Colonel Burton and

Colonel Herring to the USCMCR, and on March 14, 2016, the Senate received the President's nominations. 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016). *See also United States v. Ortiz*, 2017 CAAF LEXIS 288 (C.A.A.F. Apr. 17, 2017); *United States v. Dalmazzi*, 76 M.J. 1, 2 (C.A.A.F. 2016). On April 28, 2016, the Senate confirmed them to be judges of the USCMCR. *See id.* (citing 162 Cong. Rec. S2600 (daily ed., Apr. 28, 2016)). On May 25, 2016, President Obama signed their commissions appointing each of them to be "an Appellate Military Judge of the United States Court of Military Commission Review." *See id.*

Discussion

Title 10 U.S.C. § 973 restricts specified officers on active duty from performance of civil functions, and § 973 states:

> (a) No officer of an armed force on active duty may accept employment if that employment requires him to be separated from his organization, branch, or unit, or interferes with the performance of his military duties.
> (b) (1) This subsection applies--
> (A) to a regular officer of an armed force on the active-duty list (and a regular officer of the Coast Guard on the active duty promotion list);
>
> ***

(2) (A) *Except as otherwise authorized by law*, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States--
(i) that is an elective office;
(ii) *that requires an appointment by the President by and with the advice and consent of the Senate*; or
(iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5 [5 USCS §§ 5312-5317].
(B) An officer to whom this subsection applies may hold or exercise the functions of a civil office in the Government of the United States that is not described in subparagraph (A) when assigned or detailed to that
office or to perform those functions.
* * *
(5) Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties.

10 U.S.C. § 973 (emphasis added). In 1975, the Ninth Circuit considered whether a Navy officer's appointment as a California state notary caused him to lose his commission under 10 U.S.C. § 973. *Riddle v. Warner*, 522 F.2d 882 (9th Cir. 1975). In *Riddle*, the court assessed the legislative history of the statute and several opinions of the Attorney General and observed:

The current version of [10 U.S.C. § 973] had its genesis in an 1870 enactment. *See* Act of July 15, 1870, ch. 294, § 518, 16 Stat. 319. The legislative history is sparse; there appears to be no direct illumination of the problem. A comment by the chairman of the reporting committee, however, shows that a principal concern of the bill's proponents was to assure civilian preeminence in government, i.e., to prevent the military establishment from insinuating itself into the civil branch of government and thereby growing "paramount" to it. *See* Cong. Globe, 41st Cong. 2d Sess. App. 150 (1870). Early comment on the statute suggests that the Congress was also interested in assuring the efficiency of the military by preventing military personnel from assuming other official duties that would substantially interfere with their performance as military officers. *See, e.g.*, 13 Op. Att'y Gen. 310, 311 (1870) (position of Philadelphia Parks Commissioner determined to be a "civil office"); 15 Op. Att'y Gen. 551, 553 (1876) (position as trustees of the Cincinnati Southern Railway determined to be a "civil office"); 35 Op. Att'y Gen. 187, 190 (1927) (position as head of Louisiana State University determined to be a "civil office").

Id. at 884 (noting state court had determined commission of state notary public was a nullity under state law, and holding 10 U.S.C. § 973 was not violated because Riddle was already a notary as a Navy Judge Advocate under 10 U.S.C. § 836(a)) (internal footnote omitted).

The term "civil office" in 10 U.S.C. § 973(b) is not defined in the statute; however, it was understood by way of "contrast to the term 'military office.' An 'officer of the Army,' holding, as he does, the latter, is to be inhibited from holding also the former. The two are antithetical; their duties are, if not inconsistent, at any rate, widely different, and there is to be no point where they include or overlap each other."[2] An appointment statute that includes military "[r]ank, title, pay, and retirement are the indicia of military, not civil, office." *See Smith v. United States*, 26 Ct. Cl. 143, 147 (Ct. Cl. 1891). Presiding Judge Burton and Judge Herring's appointments on the USCMCR meet the Court of Claims tests because officers meeting the military judge requirements of 10 U.S.C. § 836 are all field grade officers, sitting military judges on the Service Courts of Criminal Appeals, and eligible for military retirement upon completion of the requisite number of years of military service. *See* 10 U.S.C. §§ 836, 948j(b), and 950f(b)(2). *See also, e.g., Winchell v. United States*, 28 Ct. Cl. 30, 35 (Ct. Cl. 1892). It does

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[2] *Acceptance of Office in National Guard of a State by Officer on Active List of the Regular Army*, 29 U.S. Op. Att'y. Gen. 298, 299 (1912); 1912 U.S. AG LEXIS 63 at *3.

not matter that the President has seen fit to appoint and the Senate confirm civilians to the USCMCR because Congress expressly provided for civilians on the USCMCR under 10 U.S.C. § 950f(b)(3). *See In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016). Congress has established a requirement for military officers to be additionally appointed by the President and confirmed by the Senate, beyond that included in their promotions to their rank, to certain specified positions, including:

the Chairman and Vice Chairman of the Joint Chiefs of Staff, 10 U.S.C. §§ 152, 154; the Chief and Vice Chief of Naval Operations, §§ 5033, 5035; the Commandant and Assistant Commandant of the Marine Corps, §§ 5043, 5044; the Surgeons General of the Army, Navy, and Air Force, §§ 3036, 5137, 8036; the Chief of Naval Personnel, § 5141; the Chief of Chaplains, § 5142; and the Judge Advocates General of the Army, Navy, and Air Force, §§ 3037, 5148, 8037. *See Weiss v. United States*, 510 U.S. 163, 171 (1994). None of the statutory provisions requiring Presidential appointment and Senate confirmation of commissioned officers to these positions specify the inapplicability of 10 U.S.C. § 973. *See* 10 U.S.C. §§ 152, 154, 3036, 3037, 5033, 5035, 5043, 5044, 5137, 5141, 5142, 5148, 8036, 8037. There have not been any challenges of their appointments under 10 U.S.C. § 973 in the courts. Military commissions are a traditional military function. U.S. military commissions or similar military tribunals have been used to prosecute offenses against the

law of war since the Revolutionary War.[3] There were 4,271documented military commission trials during the Civil War and another 1,435 during Reconstruction.[4] In the wake of World War II, the U.S. military acted as a leading proponent of and participant in thousands of war crimes trials in Germany and the Far East for violations of the law of war.[5]

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[3] *See Hamdan v. Rumsfeld*, 548 U.S. 557, 590 (2006); *Ex parte Quirin*, 317 U.S. 1, 31 n. 9 (1942) (indicating in 1780 British Major Andre was tried by a "Board of General Officers" for spying), *see also* George Davis, *A Treatise on the Military Law of the United States* 308 n.1 (rev. 3d ed. 1915) (indicating British Major Andre's tribunal was "in fact a military commission."). *See also United States v. Hamdan*, 801 F. Supp. 2d 1247, 1294-1310 (USCMCR 2011), *rev'd on other grounds, Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) (describing military commissions from the Revolutionary War through the post-World War II trials).

[4] David Glazier, *The Laws of War: Past, Present, and Future: Precedents Lost: The Neglected History of the Military Commission*, 46 Va. J. Int'l L. 5, 40 n. 223 (2005) (citing Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* 168-73, 176-77 (1991)).

[5] *See* Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trial Under Control Council Law No. 10*, at 1, 234-35 (1949), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.pdf. *See also* International Criminal

In *Quirin*, the Supreme Court addressed the authority of the President to try by military commission cases of the Nazi saboteurs captured on U.S. soil and accused of violations of the law of war as follows:

> Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. . . . By his Order creating the present Commission [the President] has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war. . . . *An important incident to the conduct of war is the adoption of measures by the military command* not only to repel and defeat the enemy, but to seize and *subject to disciplinary measures those enemies who in their attempt to thwart or impede our*

Court website, Link-Allied Tribunals of the Far East, Link-United States of America, Link-Yokohama Trials, is the Internet location for numerous trials of Japanese war criminals by the Eighth U.S. Army, https://www.legal-tools.org/en/browse/; *In re Yamashita*, 327 U.S. at 1 (1946).

> *military effort have violated the law of war.*

Ex parte Quirin, 317 U.S. 1, 28-29 (1942) (emphasis added; internal footnote omitted). The word "military" is used in the 2009 M.C.A. more than 450 times. It is beyond dispute that military commissions are primarily a military function with a direct connection to the law of war. There is no evidence that Congress intended to limit service on the USCMCR to civilians, especially in light of the specific declaration in 10 U.S.C. § 950f(b)(2) that military appellate judges could be appointed to the USCMCR.

The Department of Justice, Office of Legal Counsel observed that the phrase "otherwise authorized by law" in 10 U.S.C. § 973(b) need not be mentioned in the appointment statute to be effective.[6] The appointment statute does not, for example, need to indicate that the position to which a military officer is appointed in the appointment statute is an exception

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[6] *See Whether a Military Officer May Continue on Terminal Leave After He Is Appointed to a Federal Civilian Position Covered by 10 U.S.C. § 973(b)(2)(A)*, 40 OP. O.L.C. 1, 2016 OLC LEXIS 3, *6-*7, *10-*11 (Mar. 24, 2016) (2016 OLC Opinion) (holding military commissioned officers are "authorized by law" to hold civilian offices while on terminal leave even though that "position was covered by [10 U.S.C.] section 973(b)(2)(A).").

to the prohibition in 10 U.S.C. § 973.[7] Moreover, § 973's "'otherwise authorized by law' clause also does not list specific statutes authorizing active duty officers to hold particular civilian offices."[8]

In addition, 10 U.S.C. § 950f(b)(2), currently applying to only three military appellate judges assigned to the USCMCR, is more specific than 10 U.S.C. § 973(b)(2)(A)(ii) (currently over 1,000 Presidential appointments with Senate confirmation (PAS)),[9] and 10

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[7] *See id.*

[8] *Id.* at *10 (citations omitted).

[9] There are about 1,212 Presidential appointments with Senate confirmation (PAS) and the PAS includes "[c]abinet secretaries and their deputies, the heads of most independent agencies, and ambassadors." Zach Piaker, Center for Presidential Transition, Partnership for Public Service website (Mar. 16, 2016), http://presidentialtransition.org/blog/posts/160316_help-wanted-4000-appointees.php. *See* Christopher M. Davis and Michael Greene, *Presidential Appointee Positions Requiring Senate Confirmation and Committees Handling Nominations*, Congressional Research Service RL30959 (May 3, 2017); Henry B. Hogue and Maeve P. Carey, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, Congressional Research Service R44083 (June 22, 2015) (noting the PAS process involved more than 1,000 in Executive Branch alone). *See also, e.g., United States v. Burns*, 79 U.S. 246, 252 (1871) (con-

U.S.C. § 950f was more recently amended than 10 U.S.C. § 973.[10]

Commander-in-Chief Clause of the U.S. Constitution

Appellee Mohammad explained his argument challenging the appointments of Presiding Judge Burton and Judge Herring as follows:

> Accepting an appointment as a federal appellate judge on an independent Article I court of record is constitutionally incompatible with the status of a serving commissioned officer. Judges appointed

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cluding the Secretary of War held a "civil office," because the Secretary "is a civil officer with civil duties to perform, as much so as the head of any other of the executive departments."). *See also* 2016 OLC Opinion, *supra* n. 6, at *11-*13 (discussing "rule of relative specificity").

[10] *See* P.L. 112-81, Div A, Title X, Subtitle D, § 1034(c), 125 Stat. 1573 (Dec. 31, 2011) (most recent amendment of 10 U.S.C. § 950f); P.L. 108-136, Div A, Title V, Subtitle D[E], § 545, 117 Stat. 1479 (Nov. 24, 2003) (most recent amendment of 10 U.S.C. § 973). *See also United States v. Estate of Romani*, 523 U.S. 517, 532-33 (1998) (later, more specific statute governs); *Tenn. Gas Pipeline Co. v. FERC*, 626 F.2d 1020, 1022 (D.C. Cir. 1980) (citations omitted).

to the USCMCR under § 950f(b)(3) cannot be reassigned or otherwise removed from the USCMCR for any reason other than good cause. This level of tenure protection, only slightly below the "good behavior" tenure of an Article III judge, is irreconcilable with the President's constitutional authority as Commander-in-Chief and therefore cannot stand.

* * *

Even if Congress had contemplated the "appointment" of military officers to the principal office of USCMCR judge – which is inconsistent with the scheme of 10 U.S.C. § 950f – the good cause tenure that accompanies such an appointment would be an unconstitutional encroachment on the President's ability to direct and supervise the duties of those in the chain of-command. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2095 (2015)) ("[W]hen a Presidential power is 'exclusive,' it 'disabl[es] the Congress from acting upon the subject.'") (citation omitted); *Relation of the President to the Executive Departments*, 7 U.S. Op. Att'y. Gen. 453, 464 (1955); 1855 U.S. AG LEXIS 35 ("No act of Congress . . . can . . . authorize or create any military officer not subordinate to the President."). Unsurprisingly, there is no precedent for

> military officers simultaneously serving as principal officers with the attendant tenure protections for the chain-of command. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) (failing to find a single "case where this Court has assumed to revise duty orders as to one lawfully in the service."). It is probably no coincidence that 10 U.S.C. § 973(b), discussed above, has long been a bar to military members' simultaneous holding of civil offices that could prevent the reassignment by their military chain of command.

Appellee Mohammad Motion 11-14.

The 2009 M.C.A. § 949b(b)(4) provides the reassignment limitations for USCMCR military appellate judges:

> (4) No appellate military judge on the United States Court of Military Commission Review may be reassigned to other duties, except under circumstances as follows:
>
> (A) The appellate military judge voluntarily requests to be reassigned to other duties and the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate

> military judge is a member, approves such reassignment.
>
> (B) The appellate military judge retires or otherwise separates from the armed forces.
>
> (C) The appellate military judge is reassigned to other duties by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, based on military necessity and such reassignment is consistent with service rotation regulations (to the extent such regulations are applicable).
>
> (D) The appellate military judge is withdrawn by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, for good cause consistent with applicable procedures under chapter 47 of this title (the Uniform Code of Military Justice).

10 U.S.C. § 949b(b)(4).

The reassignment limitations in 10 U.S.C. § 949b(b)(4) along with other provisions in the 2009 M.C.A. are designed to ensure that the USCMCR is

free from improper influence. Congress has an important role in ensuring Appellees' military commission is protected from improper influence, and one way of doing that is to limit reassignment of appellate military judges. Congress's important role is specifically defined in the U.S. Constitution. The preamble of the Constitution "provides for the common defence." To implement that goal, the Constitution sets forth the powers of Congress as follows:

> [T]he Constitution gives to Congress the power to "provide for the common Defence," Art. I, § 8, cl. 1; "To raise and support Armies," "To provide and maintain a Navy," Art. I, § 8, cl. 12, 13; and "To make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14. . . . And finally, the Constitution authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18.

Quirin, 317 U.S. at 26. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643 (1952) (Jackson, J., concurring). The USCMCR appellate judges are not the only entity where Congress has addressed assignments and reassignments. Congress has enacted several statutes limiting assignments of military officers.

See, e.g., 10 U.S.C. § 154(a)(3) (defining tour length of Vice Chairman of Joint Chiefs of Staff); *id.* at §§ 661, 664, 668 (defining the qualifications, duration, and standards for tours of officers in joint duty assignments); *id.* at § 671 (prohibiting assignment overseas on land before completing entry-level training); *id.* at § 1161 (limiting the President's authority to drop an officer from the rolls for misconduct); *id.* at § 3033 (limiting the time an officer may serve as Chief of Staff of the Army). *See also, e.g.*, *Clinton v. Goldsmith*, 526 U.S. 529, 532, 540 (1999) (reversing CAAF decision under the All Writs Act to enjoin the President and other officials from dropping Goldsmith from the Air Force rolls under 10 U.S.C. § 1161).

Conclusion

We affirm our previous decision that USCMCR military appellate judicial positions occupied by commissioned officers qualified under 10 U.S.C. §§ 826, 948j(b), and 950f(b)(2) initially assigned by the Secretary of Defense under 10 U.S.C. § 950f(b)(2), nominated by the President, confirmed by the Senate, and appointed by the President as "an Appellate Military Judge" under 10 U.S.C. § 950f(b)(3) to the USCMCR does not violate the civil office provision in 10 U.S.C. § 973(b). Military commissions are a traditional military function, and Presiding Judge Burton's and Judge Herring's service as military appellate judges is "authorized by law." The limitation on the President's removal or reassignment authority in the 2009 M.C.A. § 949b(b)(4) does not violate the Constitution's Com-

mander-in- Chief Clause. Appellee Mohammad's Motion does not establish disqualification of Presiding Judge Burton and Judge Herring. Accordingly, there is no basis to abate these proceedings.

ORDER

Therefore, it is hereby

ORDERED that Appellee Mohammad's motion does not establish a basis to disqualify Presiding Judge Burton and Judge Herring, and his motion to disqualify them is DENIED. It is further

ORDERED that Appellee Mohammad's motion does not establish a basis to require three military appellate judges to be assigned to Appellee's panel, and his motion to require three military appellate judges to be assigned to his panel is DENIED. It is further

ORDERED that Appellee Mohammad's motion that this Court declare the limitation in the 2009 M.C.A. § 949b(b)(4) on the President's authority to reassign appellate military judges to be a violation of the Constitution's Commander-in-Chief clause is DENIED. It is further

ORDERED that Appellee Mohammad's motion to abate his appeal is DENIED.

FOR THE COURT:

//signature//
Mark Harvey
Clerk of Court,
U.S. Court of Military Commission Review

[APPENDICES OMITTED]